Supreme Court, U.S.
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No. ____

In the

Supreme Court of the United States

October Term, 1995

Canadian General Insurance Company,

Petitioner,

vs.

Domtar, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER A CANADIAN INSURER'S ISSUANCE OF INSURANCE POLICIES IN CANADA TO A CANADIAN INSURED FOR POLICY PERIODS OF 1956-1965 PROVIDING COVERAGE AGAINST LIABILITY FOR ACCIDENTS DURING THE POLICY PERIOD CONSTITUTES SUFFICIENT MINIMUM CONTACTS WITH THE STATE OF MINNESOTA FOR PERSONAL JURISDICTION WHEN

(A) AT THE TIME OF THE POLICY THE INSURED HAD NO OPERATIONS IN MINNESOTA AND HAD SOLD THE SITE OF PRIOR OPERATIONS, AND

(B) THE ENVIRONMENTAL DAMAGE CLAIMS FOR WHICH THE INSURED SOUGHT COVERAGE AROSE OUT OF THE INSURED'S PREDECESSOR'S MINNESOTA OPERATIONS DURING THE YEARS 1924 TO 1948.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE MINNESOTA SUPREME COURT

Domtar, Inc.
Niagara Fire Insurance Company
Continental Insurance Company
Allstate Insurance Company of Canada
American Home Assurance Company
Canadian General Insurance Company
Chubb Insurance Company of Canada
Columbia Casualty Company
Federal Insurance Company
Gerling Global Reinsurance Corporation
Halifax Insurance Company
CIGNA Insurance Company of Canada (formerly INA Insurance Company of Canada)
New Hampshire Insurance Company
Scottish & York Insurance Company
Zurich Insurance Company
World Auxiliary Insurance Corporation Limited
Certain Underwriters at Lloyd's of London

Canadian General Insurance Group Limited is the parent company of Petitioner Canadian General Insurance Company. Petitioner Canadian General Insurance Company has ownership interests in the following non-wholly owned subsidiaries: none.

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PETITION FOR WRIT OF CERTIORARI

Canadian General Insurance Company petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota in this case.

OPINIONS BELOW

The decision of the Minnesota Supreme Court was reported as Domtar, Inc. v. Niagara Fire Insurance Co., 533

N.W.2d 25 (Minn. 1995) and is reproduced in Appendix A, *infra*. The decision of the Minnesota Court of Appeals was reported as Domtar, Inc. v. Niagara Fire Insurance Company, 518 N.W.2d 58 (Minn.Ct.App. 1994) and is reproduced in Appendix B, *infra*. The Order and Memorandum of the Minnesota District Court was unreported. It was filed as Domtar, Inc. v. Niagara Fire Insurance Company, No. CO-91-8218 (Minnesota District Court, 2nd Judicial District, Nov. 17, 1993) (Order and Memorandum) and is reproduced in Appendix C, *infra*.

JURISDICTION

By a final judgment filed on June 16, 1995, the Minnesota Supreme Court affirmed the denial of Petitioner's motion to dismiss Respondent's claims for lack of personal jurisdiction pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. By order filed on July 25, 1995, the Minnesota Supreme Court denied Petitioner's petition for rehearing with respect to the June 16, 1995 judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (1994).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provision of the United States Constitution involved is the Due Process Clause of the Fourteenth Amendment:

> Section 1 ... nor shall any State deprive any person of life,

> liberty, or property without due process of law ... .

Minnesota Statutes Section 543.19 (1994) provides:

> As to a cause of action arising from any acts enumerated in this subdivision, a court of this state ... may exercise jurisdiction over any foreign corporation ... . This section applies if, in person or through an agent, the foreign corporation ... .
>
> * * *(b) Transacts any business within the state"

The Minnesota Supreme Court has held that the personal jurisdiction requirements of the federal constitution and of Minn. Stat. § 543.19 (1994) are the same. Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408 (Minn. 1992).

STATEMENT OF THE CASE

In 1991, Respondent Domtar, Inc. ('Domtar'), a Canadian corporation, commenced an action in Minnesota against Petitioner Canadian General Insurance Company ('Canadian General'), also a Canadian corporation, and fifteen other alleged liability insurers. Domtar had received notice that it was a potentially responsible party for pollution on a site in Duluth, Minnesota, and had been required to undertake an investigation and cleanup. (Appendix A-2, B-2-3.) Domtar alleged that this notice triggered Canadian General

insurance policies and that Canadian General owed indemnity and defense coverage for environmental liability claims under accident liability policies issued by Canadian General in Canada for policy periods 1956 to 1965. (Appendix A-2; B-3.)

Canadian General moved to dismiss the action for lack of personal jurisdiction. Prior to the ruling on motion, the Trial Court allowed discovery proceedings on the jurisdictional issue. (Appendix A-2-5i; B-4.) Accordingly, the factual record is complete and essentially undisputed concerning jurisdiction.

By uncontradicted affidavit, and as essentially relied on and acknowledged by the Minnesota Supreme Court, Canadian General is a Canadian corporation with its principal offices located in Scarborough, Ontario. (Appendix A-4.) Canadian General is not and had never been licensed to do business in the State of Minnesota, or in any other state of the United States; (Appendix A-4; B-3.) Canadian General was not engaging in and had not engaged in any business in Minnesota; Canadian General has not and does not maintain offices in Minnesota or in any other locations outside of Canada; Canadian General does not, nor had it ever, maintained offices, agents, or employees in Minnesota or in any other state for the purposes of transacting any business in such states. (Appendix A-4.) Canadian General does not possess any interest in any real or personal property or bank accounts located within the State of Minnesota (Appendix A-4); and Canadian General has not issued any policies of insurance to any resident of the State of Minnesota, (Appendix A-4) has not transacted its insurance business in this State and has not issued any policies of insurance to residents of Minnesota. (Appendix A-5.)

In 1956 and continuing through 1965, Domtar had no ongoing operations in Minnesota. However, in 1924, Domtar's predecessor began operating a tar manufacturing

plant at Duluth, Minnesota. (Appendix A-3.) In 1930, Domtar's subsidiary began operating the plant until it ceased operations in 1948. (Appendix A-3.) In 1955, the plant had been demolished, and Domtar sold the site. (Appendix A-3.) That sale effectively concluded Domtar's operations in Minnesota. (Appendix B-14). Thus, Domtar effectively ceased operations in Minnesota prior to any alleged Canadian General policies of insurance. (Appendix B-13-14.)

In March 1991, the Minnesota Pollution Control Agency ("MPCA") issued a Request for a Response Action to Domtar and other former owners of adjoining properties under Minn. Stat. § 115B.17 and 115B.18.[1] The MPCA identified Domtar as a potentially responsible party with respect to alleged pollution at the tar plant site and requested that Domtar conduct investigations and submit reports to the MPCA. (Appendix A-2; B-2-3.) Domtar tendered the MPCA's request to Canadian General and the other insurers as a "claim" and then commenced this action. (Appendix B-3.)

In this suit, Domtar claims that Canadian General insured it under accident liability policies providing coverage from October 1, 1956, through February 18, 1965. (Appendix A-3; B-3.) Only one specific insurance policy issued by Canadian General has been found which provided coverage to Domtar prior to Domtar's name change. Domtar's address is stated as "Sun Life Building, Montreal, P.Q." The Policy Period is from January 1, 1960, to January 1, 1963. (Appendix B-4.) Property damage is provided by an Endorsement to that policy under which the insurer agreed:

> To pay on behalf of the Insured all sums which the insured shall become obligated to pay . . . for

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[1] These statutory sections are part of Minnesota's Environmental Response and Liability Act enacted in Minnesota in 1983, approximately 18 years after the last alleged Canadian General policy year.

> damages because of damage to or destruction of property caused by accident occurring during the Policy Period and while this Endorsement is in force.
>
> (Appendix B-4.)

The Liability Policy and Property Damage Endorsement were both subject to an Exclusion for:

> . . . any claim arising or existing by reason of any of the following matters:
>
> 1. Accidents occurring outside Canada and the United States of America.
>
> (Appendix A-4.)

Domtar conducted both document discovery and deposition discovery of Canadian General employees during discovery on the jurisdictional issue. No underwriting files from Domtar from 1956 to 1965 were discovered (Appendix A-4; B-4) nor did current employees have knowledge of Canadian General underwriting practices for the 1956 to 1965 time period. (Appendix B-13.) Deposition testimony indicated Canadian General attempted not to insure risks in the U.S. It was estimated that there would be no U.S. location or operation for probably 99 percent of the insurer's risks. Canadian General's casualty manager of 9 years could recall only two situations where Canadian General agreed to cover Canadian insureds with border operations which extended into the United States. (Appendix A-13.) While a Canadian General Vice President speculated that a 1960s underwriting file would have included a description of the insured's operations, an estimate of sales broken down by various types of operations, location of operations, a description of prior

claims history and inspection reports pertaining to the insured's main operations, (Appendix A-14, 15.), Domtar produced no evidence that Canadian General considered past operations of the demolished and sold tar plant in issuing alleged policies for the 1956 to 1965 time period. (Appendix B-13.)

By an Order and Memorandum filed on November 17, 1993, the Minnesota District Court denied Canadian General's motion to dismiss, finding there existed specific[2] personal jurisdiction. (Appendix C.) With respect to the issue of whether constitutionally sufficient minimum contacts had been shown the trial court ruled:

> Here, defendant Canadian General purposefully directed actions toward the forum State of Minnesota by issuing an indemnity policy covering claims against Domtar in any state of the United States, including Minnesota.

Domtar, Inc. v. Niagara Fire Ins. Co., No. CO-91-8218 (Minn.Dist.Ct., 2nd Jud. Dist., Nov. 17, 1993) (Order and Memorandum), (Appendix C-6.). The trial court further observed:

> In an article entitled, Personal Jurisdiction Over Alien Insurance Companies: The Territory-of-Coverage

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[2] See, Helicopteros Nationales De Colombia, S.A. v. Hall, 466 U.S. 408 (1984). Domtar also asserted there was general jurisdiction, based upon unrelated construction bonds issued by Insurance Company of North America and an indemnity agreement between INA and Canadian General. The Minnesota trial and Minnesota appellate courts which have considered this matter specifically rejected the claim of general personal jurisdiction over Canadian General, based on that transaction or any other alleged Canadian General contacts with Minnesota. (Appendix A, B and C.)

> Rule, 26 Tort & Ins. L.J., 3 (1991), William C. Hoffman concludes that numerous courts exercise jurisdiction over alien insurance carriers on a basis that appears to require less contact than the Constitution generally requires.

Domtar, Inc. v. Niagara Fire Ins. Co., No. CO-91-8218 (Minn.Dist.Ct., 2nd Jud. Dist., Nov. 17, 1993) (Order and Memorandum), (Appendix C-8.).

Under Minnesota law, an order denying a motion to dismiss for lack of personal jurisdiction is regarded as a determination of right and is immediately appealable. Stanek v. A.P.I., Inc., 474 N.W.2d 829 (Minn.Ct.App. 1991). Canadian General timely perfected an appeal of the trial court's November 17, 1993 order to the Minnesota Court of Appeals. In its Appellant's Brief dated January 5, 1994, Canadian General asked the Minnesota Court of Appeals to determine:

> Whether, in the absence of Minimal Contacts with the State of Minnesota, the Trial Court may exercise personal jurisdiction based upon a territorial exclusion clause in an insurance policy?

In a June 21, 1994, split decision the Minnesota Court of Appeals affirmed the trial court's order finding specific jurisdiction, but on different grounds. Not relying on the territorial coverage exclusion, the Minnesota Court of Appeals held:

> In the present case, as in AIU [AIU Ins. Co. v. Superior Court, 222 Cal. Rptr. 880 (Cal. Ct. App. 1986)] the cause of action against Canadian General arises out of Canadian General's insuring of Domtar's assets and activities in Minnesota. We hold

that this is sufficient to allow a Minnesota court to exercise personal jurisdiction over Canadian General.

Domtar, Inc. v. Niagara Fire Ins. Co., 518 N.W.2d 58, 63 (Minn.Ct.App. 1994), (Appendix B-10.) One member of the Minnesota Court of Appeals' three judge panel (the Honorable Harriet Lansing) dissented:

> The evidence is undisputed that two years before Canadian General first decided to insure Domtar, a Canadian company, Domtar had sold its Minnesota plant and no longer conducted operations in Minnesota. Because Canadian General directed no contacts toward Minnesota, the exercise of jurisdiction violates long-standing jurisdictional principles and disregards the enhanced jurisdictional burden that applies when defendant is a foreign national * * *
>
> A defendant must have minimum contacts with the forum state 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Canadian General's contacts with Minnesota are insufficient to establish either general or specific jurisdiction, and I would reverse.

Domtar, Inc., 518 N.W.2d at 63, 65. (Appendix B-12, 14, 15.)

Canadian General timely petitioned the Minnesota Supreme Court for discretionary review of the Minnesota Court of Appeals' decision as permitted by Minn.R.Civ.App.P. 117. In its Appellant's Brief, Canadian General requested that the Minnesota Supreme Court determine:

> Whether, in asserting personal jurisdiction over a Canadian insurer, the Due Process Requirement of purposefully established contacts in the forum state by the insurer is satisfied solely by its issuance of a liability policy in Canada to a Canadian insured?

In a decision by four justices (three justices abstaining) filed on June 16, 1995, the Minnesota Supreme Court affirmed the Minnesota Court of Appeals' holding that specific jurisdiction existed:

> Based on the information likely contained in Canadian General's 1960 underwriting file, we conclude that Canadian General constructively knew that Domtar had formerly operated a tar manufacturing facility in Duluth. By deciding to issue a general liability policy allegedly insuring Domtar against liability arising from its Duluth tar manufacturing operation, Canadian General purposefully established the required contacts with Minnesota. Furthermore, Minnesota is the situs of the accident creating liability that Canadian General purportedly agreed to defend Domtar against.
>
> For these reasons, we hold that Domtar's coverage claim against Canadian General arises out of or relates to Canadian General's minimum contacts with Minnesota, thereby supporting a Minnesota court's assertion of specific personal jurisdiction over Canadian General in the present case.

Domtar, Inc. v. Niagara Fire Insurance Co., 533 N.W.2d at 33, 34 (Minn. 1995). (Appendix A-15.)

Canadian General timely petitioned the Minnesota Supreme Court for rehearing as permitted by Minn.R.Civ.App.P. 140. By order filed July 25, 1995, the Minnesota Supreme Court denied Canadian General's petition for rehearing with respect to the June 16, 1995, decision. (Appendix D-1.)

During the pendency of Canadian General's appeal, Domtar dismissed its claims without prejudice against eleven of the other insurers and proceeded to trial of its claims against Niagara Fire Insurance Company, Continental Insurance Company, World Auxiliary Insurance Corporation Limited and Certain Underwriters at Lloyd's of London. By order of the District Court, the trial proceedings were stayed as to Canadian General, pending appeal on the jurisdictional issue. Following a jury trial, Domtar obtained money judgment of $2,837,679.70, as amended by subsequent order, against Niagara Fire Insurance Company and Continental Insurance Company, and a declaration of rights relative to the trial defendants.

ARGUMENT

I. The Minnesota Supreme Court's Decision Conflicts with the "Minimum Contacts" Jurisdictional Standard as Established by the Decisions of this Court.

The decisions of this Court in examining state court jurisdiction under the Due Process Clause have clearly and repeatedly required a showing of "minimum contacts" for personal jurisdiction. None of the decisions of this Court since International Shoe Co. v. Washington, 326 U.S. 310 (1945) have intimated that different and less stringent standards apply when determining whether specific personal jurisdiction exists over an alien corporation, nor that different jurisdictional

standards apply to insurance companies, domestic or foreign. Due Process applies equally to all litigation defendants.

Since 1945, this Court's decisions with respect to personal jurisdiction have required a basic showing of "minimum contacts" by the defendant with the forum state as a first step to deciding jurisdictional questions. In Burger King Corporation v. Rudzewicz, 471 U.S. 462 (1985) this Court described the minimum contacts specific jurisdiction test for claims arising out of, or relating to, a defendant's activities in the forum state:

> ...[T]he constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum State. International Shoe Co. v. Washington, *supra*, 326 U.S., at 316, 66 S.Ct., at 158. Although it has been argued that foreseeability of causing injury in another State should be sufficient to establish such contacts there when policy considerations so require, the Court has consistently held that this kind of foreseeability is not a "sufficient benchmark for exercising personal jurisdiction." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 295, 100 S.Ct., at 566. Instead, 'the foreseeability that is critical to due process analysis...is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." Id. at 297, 100 S.Ct. at 567.

471 U.S. at 474. The Court has repeatedly ruled that the inquiry be directed at acts of the defendant. Thus, in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) the Court stated:

> ... a state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state.

444 U.S. at 291. In Hanson v. Denckla, 357 U.S. 235 (1958) the Court ruled:

> ... [It] is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

357 U.S. at 253. Again, in Asahi Metal Ind. v. Superior Court of California, 480 U.S. 102 (1987), the Court described the required purposeful availment as follows:

> The 'substantial connection,' Burger King, 471 U.S. at 475, 105 S.Ct., at 2184; McGee v. Int'l. Life Ins. Co., 355 U.S. at 233, 78 S.Ct., at 201, between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum state.

480 U.S. at 112. In Burger King Corp. the Court applied this test to a jurisdictional dispute arising out of a contractual relationship and ruled:

> If the question is whether an individual's contract with an out-of-state party alone can automatically establish sufficient minimum contracts in the other party's home forum, we believe the answer clearly is that it cannot.

471 U.S. at 478.

Further, the Court has held that "purposeful availment" cannot be established by the unilateral activity of another party or a third person. See, e.g. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

a) Canadian General had no minimal contacts with the State of Minnesota

The Minnesota Supreme Court acknowledged in its opinion that essentially Canadian General had no direct contact with Minnesota. (Appendix A-4.) Canadian General had no office, agents, property or business in the state. It neither solicited sales nor sold insurance to residents of Minnesota. In short, Canadian General had no presence in Minnesota for jurisdictional purposes.

b) Issuance of a Canadian insurance policy does not constitute contact with Minnesota.

Under the minimal contacts standard set forth by the Court, clearly issuance of an insurance policy in Canada to a Canadian insured without more is insufficient for jurisdictional purposes. Implicitly recognizing the lack of contacts, the Minnesota Supreme Court seized on constitutionally irrelevant facts and speculation to provide a rationale. First, the Court speculated that Canadian General "constructively knew" that Domtar had operated a tar plant in Minnesota. The Court then asserts that this constructive knowledge transforms the issuance of the policy into purposefully establishing "the

required minimum contacts with Minnesota" without a "Due Process" based rationale. (Appendix A-15.)

Second, the Minnesota Supreme Court, referring to the Court of Appeals' decision, also reasoned that in 1960 a known possibility existed that Domtar could be liable for groundwater contamination under Minnesota law, (Appendix A-14.) and therefore would lead Canadian General to knowledge of the past tar plant operations and the risk of liability. While this risk to Domtar may or may not have existed, the facts are that Domtar is not seeking coverage for common law liability which existed at the time of the policy, but rather for response actions under a statute enacted in 1983, long after the policy period. The policy is an accident, rather than occurrence, policy.[3] Thus, the policy itself is not a contact with Minnesota because Minnesota operations had already ceased at the time of the policy.

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[3] The policy at issue was an "accident triggered" liability policy. (Appendix B-4.) As of 1956, no Minnesota reported decisions had held that Minnesota law would impose liability on an accident liability insurer for "accidents" allegedly happening before the inception of the policy's coverage period. Prior to 1966 (when new "occurrence" triggering language was added to the standard forms) the insurance industry in general had interpreted "accident" policies to cover only events which took place both without the intent or knowledge of the insured and which were referable to a fixed time within the policy's coverage period. See E. Joshua Rosenkranz, Note, The Pollution Exclusion Clause Through the Looking Glass, 74 Geo. L.J. 1237, 1241-1242 (1986).

Many courts from other jurisdictions had agreed in well-reasoned opinions. See e.g. Leggett v. Home Indemnity Co., 461 F.2d 257 (10th Cir. 1972); Foreman v. Jordan, 131 So.2d 796 (La.Ct.App. 1961); Farmers Elevator Mutual Ins. Co. v. Burik, 187 N.E.2d 12 (Ill.Ct.App. 1962), Borg-Warner Corp. v. Insurance Co. of North America, 577 N.Y.S.2d 953 (N.Y.App.Div. 1992).

c) The territory of coverage of an insurance policy is not a basis for personal jurisdiction.

The Minnesota Supreme Court disclaimed relying on territory of coverage as a basis for jurisdiction. Even if it had, however, it would be equally unwarranted to find specific jurisdiction based upon the territorial coverage exclusion. In Rush v. Savchuk, 444 U.S. 320 (1980), this Court drew a distinction between the operative facts of an underlying auto liability claim being asserted against an insured and the "fictitious presence" of the insurer's obligation to defend the insured in Minnesota and 49 other states and held that *quasi in rem* jurisdiction could not be asserted over the insured, based upon the insurer's duty to defend.

An insurer's failure to structure its policy to prevent the possibility of having to defend covered third party claims in locations which are beyond the geographic scope of the insurer's own business operations (usually because of an insured's unilateral decision to locate the risk) cannot be jurisdictionally equated with the "purposeful availment" which results from an insurer's own decision to enter a forum market by selling its product to forum residents. The distributor's and retailer's warranties in World-Wide Volkswagen Corp. Woodson, 444 U.S. 286 (1980) did not stop at the New Jersey border. Nevertheless, despite the "transitory" and national scope of the defendants' assumed obligations, this Court found that they had insufficient minimum contacts with the Oklahoma

forum to support jurisdiction by the Oklahoma courts.

If jurisdiction may rest on the "territory of coverage" of an insurance policy, then a new and different basis for personal jurisdiction must be articulated. Mere territory of coverage cannot and does not meet the "purposeful availment" standard this Court has set forth in its decisions to date.

d) The Minnesota Supreme Court erred in determining that exercising jurisdiction over Canadian General comports with traditional notions of fair play and substantial justice under the decisions of this Court.

The Minnesota Supreme Court also ruled that a Minnesota court's assertion of specific personal jurisdiction over Canadian General in this case would comport with traditional notions of fair play and substantial justice. Domtar, Inc., 533 N.W. 2d at 34. (Appendix A-15-17.) This ruling was in conflict with this Court's decision in Asahi Metal Industry Co., Ltd. This case, as in Asahi Metal Industry Co., Ltd., involves an alien defendant which will be substantially burdened by being forced to submit to a foreign nation's judicial system. Like the dispute in Asahi Metal Industry Co., Ltd., the forum state's interest in this case is considerably diminished by the fact that it is primarily about an indemnity dispute between two foreign nationals as to which the state is not a party. Domtar's interest in obtaining convenient and effective relief could have been easily vindicated if it had sued all of the parties in Canada, the nation of its citizenship, the nation where all of the alleged policies were issued, and the nation where many of the witnesses who will be required to testify

> concerning insurance coverage issues live. As in Asahi Metal Industry Co., Ltd., the interests of the "several states," in addition to Minnesota, in the efficient judicial resolution of the dispute and advancement of substantive policies must give way to a careful inquiry into the procedural and substantive policies of other nations and
>
> > ... an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state.

480 U.S. at 115.

II. This Case Presents Important and Unsettled Issues of Law Under the Federal Constitution Which Should be Settled by this Court.

Since this Court decided International Shoe Co. in 1945 and announced the "minimum contacts" test, this Court has seldom applied it in jurisdictional disputes involving out-of-state insurers. In Travelers Health Ass'n v. Commonwealth of Va., 339 U.S. 643 (1950) this Court held that Virginia could enjoin an out-of-state insurer's violations of the Virginia Blue Sky Law where the insurer had "systematically and widely" delivered insurance certificates into that state, based on the recommendations of Virginia residents. Similarly, in McGee v. Int'l. Life Insurance Co., 355 U.S. 220 (1957) this Court applied the minimum contacts test to hold that California courts could exercise jurisdiction over a life insurance dispute between a California policy claimant and a Texas insurer where the policy was delivered in California, premiums were regularly paid from there, and the alleged insured was a California resident when he died.

The present case includes issues which are far beyond the scope of these prior decisions, issues which are becoming increasingly common in the important insurance field of environmental liability coverage. How is the "minimum contacts" test to be applied where none of the parties are residents of the forum state and entered their insurance contract beyond its borders? What, if any, is the significance of a territorial coverage provision? How should the "minimum contacts" test be applied where the risk-producing activity was no longer located in the forum state at the time the policy was written? How should (or should) the "minimum contacts" test be applied to alien insurers which contract with other alien corporations beyond the borders of the United States?

In Asahi Metal Industry Co., Ltd., a jurisdictional dispute arising from a foreign indemnity contract, this Court warned that in every case involving jurisdiction over an alien defendant careful inquiry is required in evaluating the reasonableness of the assertion of personal jurisdiction and that great care should be exercised when extending our notions of personal jurisdiction into the international field.

Jurisdiction over Canadian General is based on the Minnesota Supreme Court's reasoning that Canadian General's obligation to defend and indemnify Domtar for Domtar's obligations under environmental cleanup statutes evidences sufficient minimal contacts for jurisdictional purposes. Canadian General disputes any such obligation exists. Does it follow, then, that if the Minnesota court determines no such obligation exists that the Minnesota court had no jurisdiction to make that determination? Or, in the alternative, does the Minnesota court acquire jurisdiction to determine such an obligation exists when the very existence of that obligation is the "touchstone" upon which jurisdiction must rest?

Had the identical Request for Response Action been made against Domtar in Wisconsin and Domtar had brought its

claims against Canadian General in Wisconsin, there would be no "damage" under Wisconsin law, and there is no policy obligation to defend for statutorily imposed environmental obligations. Would the Wisconsin courts then have no jurisdiction? Compare City of Edgerton v. General Casualty Company of Wisconsin, 517 N.W.2d 463 (Wis. 1994) with Minnesota Mining and Manufacturing Co. v. Travelers Indemnity Co., 457 N.W.25 175 (Minn. 1990). Due Process should not depend on the state where suit is brought or what allegation a claimant chooses to make in its lawsuit. Constitutional Due Process must have as its foundation the contact between the defendant and the forum, not the plaintiff's claim and the forum. Rush v. Savchuk, 444 U.S. 320 (1980). If the constitutional touchstone for jurisdiction over insurer defendants is to be something other than minimal contacts, that standard needs to be articulated by this Court.

The present case now presents the Court with the opportunity to give courts of the United States guidance as to how they are to apply the "minimum contacts" facet of the jurisdictional test to alien insurers in insurance disputes which are brought over our borders. It is respectfully submitted that the decision of the Minnesota Supreme Court to exercise jurisdiction on the facts of the present case is not without grave importance to federal commercial and political relations involving Canada and other foreign nations with business relations with the United States.

III. The State and Federal Court Decisions are in Conflict Over Issues Presented by the Present Case.

Recently, the Supreme Court of New Jersey has held that personal jurisdiction could not be asserted over Canadian General and certain other alien and out-of-state insurers with respect to an environmental liability coverage dispute, despite the fact that the applicable policies contained United States

and Canada territory coverage provisions where the insurers had not otherwise purposefully availed themselves of the benefits of the forum state's jurisdiction and the alleged insureds were out-of-state residents. Waste Management, Inc. v. Royal Insurance Co., 649 A.2d 379 (N.J. 1994), cert. denied, 115 S.Ct. 1175 (1995). In the present case, the Minnesota Supreme Court has now held that Minnesota's jurisdictional reach over Canadian General involving a dispute between alien citizens, under an alleged alien insurance contract involving a risk not located in Minnesota at the time of contracting, is broader than that which could be exercised in New Jersey under the same federal constitution.

Although the Minnesota Supreme Court eschewed reliance on the territorial coverage exclusion, it is submitted that the federal decision it chiefly relies upon (Farmers Ins. Exchange v. Portage La Prairie Mutual Ins. Co., 907 F.2d 911 (9th Cir. 1990)) derives its finding of purposeful availment entirely from the presence of a territory of coverage clause. The decisions of other federal and state courts have similarly differed over the jurisdictional significance of territorial coverage provisions under this Court's "minimum contacts" test. Compare, e.g., Rossman v. State Farm Mut. Auto. Ins. Co., 832 F.2d 282 (4th Cir. 1987) and Payne v. Motorists' Mutual Ins. Cos., 4 F.3d 452 (6th Cir. 1993) (both relying upon territory of coverage provisions in auto liability policies) with Meyer v. Auto Club Ins. Assoc., 492 So.2d 1314 (Fla. 1986) (rejecting territorial coverage clause jurisdictional argument, based upon World-Wide Volkswagen) and Batton v. Tennessee Farmers Mut. Ins. Co., 736 P.2d 2 (Ariz. 1987) (issuing an insurance policy providing nationwide coverage is no different than selling a product, such as a car, with a warranty that it is fit for its intended use and with the knowledge that it may be used nationwide. World-Wide Volkswagen establishes that jurisdiction is improper in either case).

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should grant a writ of certiorari to review the decision of the Minnesota Supreme Court.

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

CX-93-2449

Court of Appeals Keith, C.J.
Took no part, Coyne, Gardebring & Stringer, JJ.

Domtar, Inc.,

Respondent,

vs.

Niagara Fire Insurance Co., et al.,

Defendants,

and

Canadian General Insurance Co., petitioner
Filed: June 16, 1995
Appellant. Office of Appellate Courts

SYLLABUS

A Canadian insurer purposefully established minimum contacts with Minnesota by allegedly agreeing to defend its insured against liability arising from an insured risk located in Minnesota.

Because Minnesota is the situs of the accident creating liability that the Canadian insurer allegedly agreed to defend its insured against, the insured's coverage claim against the insurer arises out of or relates to the insurer's minimum

contacts with Minnesota, thereby supporting the assertion of specific personal jurisdiction over the insurer in Minnesota.

Subjecting the Canadian insurer to specific personal jurisdiction in Minnesota is reasonable.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

KEITH, Chief Justice.

The Minnesota Pollution Control Agency ("MPCA") issued to Domtar, Inc. a Request For Response Action ("RFRA") relating to the release or threatened release of hazardous substances at an environmentally contaminated property located in Duluth, Minnesota. Domtar commenced against its alleged insurers the declaratory judgment action underlying this appeal. Domtar sought a judgment declaring that defendants are obliged to defend Domtar against the MPCA's allegations and to reimburse Domtar for investigation costs it has incurred.

Canadian General Insurance Company, one of three alleged primary insurers in the underlying declaratory judgment action, moved to dismiss Domtar's claims based on lack of personal jurisdiction. The district court denied Canadian General's motion, concluding that Canadian General was subject to personal jurisdiction in Minnesota. The Minnesota Court of Appeals affirmed. Domtar, Inc. v. Niagara Fire Ins. Co., 518 N.W.2d 58, 63 (Minn. App. 1994). Because we hold that Canadian General is subject to specific personal jurisdiction in Minnesota, we affirm.

The St. Louis River/Interlake/Duluth Tar Site ("the Site") is located in the city of Duluth, St. Louis County, Minnesota.

The Site, which encompasses approximately 230 acres of land and river embayment, is located on the north bank of the St. Louis River, approximately four miles upstream from Lake Superior.

For decades, various entities used parts of the Site for industrial purposes. In 1924, Dominion Tar and Chemical Company, Ltd., which ultimately changed its name in 1977 to Domtar, Inc. ("Domtar"), began operating a tar processing or manufacturing plant on a part of the Site. American Tar and Chemical Company, a subsidiary of Dominion Tar, was created in 1930 and continued operating the tar plant until 1948, when it ceased manufacturing operations. Domtar sold its part of the Site in 1955.

In August 1987, the MPCA initiated a remedial investigation of the Site. The MPCA determined that hazardous substances had been released or threatened to be released at the Site, thereby contaminating soil and groundwater. To further evaluate the environmental and health effects of the contamination and to select the appropriate remediation technology, the MPCA concluded that additional investigations of the extent of the contamination needed to be conducted. Therefore, after identifying Domtar as a party responsible for the release or threatened release of hazardous substances at part of the Site, the MPCA issued to Domtar a RFRA.

Domtar, incorporated under the laws of Canada with its principal place of business located in Montreal, Quebec, Canada, then brought an action against its primary and excess general liability insurers, including Canadian General. Domtar alleges that Canadian General issued to Domtar general liability policies whose coverage periods extended from October 1, 1956 through February 18, 1965. Canadian General has not retained any of Domtar's applications for insurance coverage, any of the policies issued to Domtar, or

any of the underwriting materials presumably gathered or generated at the time it issued the policies to Domtar.

Through discovery efforts, one Canadian General policy has been located, allegedly insuring Domtar against liability from January 1, 1960 through January 1, 1963. The policy provides comprehensive general liability coverage for claims arising out of accidents occurring in "Canada and the United States of America."[1] Although the parties were able to locate only one policy, covering 1960-63, that policy indicates that it is a replacement or renewal of a prior policy. The district court concluded that circumstantial evidence indicated that Canadian General insured Domtar from 1956-1965.[2]

Canadian General is a Canadian corporation whose principal place of business is located in Scarborough, Ontario, Canada. Canadian General is not now and never has been licensed to do business in Minnesota. Canadian General asserts that is does not maintain, and never has maintained, any offices, employees, or agents in Minnesota. Canadian General asserts that it has no bank accounts in Minnesota and owns no real or personal property in Minnesota. Finally,

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[1] The territory of coverage is expressed negatively, as an exclusion. Specifically, the policy provides, "This policy shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of * * * 1. Accidents occurring outside Canada and the United States of America."

[2] During his deposition, L.B. Bowden, Canadian General's Executive Vice-President, acknowledged that policies issued in 1960 typically covered a term of three years. Bowden further stated that he would expect the prior policy, which was allegedly renewed by the discovered policy, to cover the three years preceding the discovered 1960 policy. During another deposition, Robert W. Ross, Canadian General's former Vice-President in Toronto, stated that he expected the prior policy probably would have been the "same kind' as the found policy that replaced it.

Canadian General asserts that it has not issued any policies of insurance to any residents of Minnesota.

After the parties completed discovery on the issue of personal jurisdiction, the district court denied Canadian General's motion to dismiss for lack of personal jurisdiction. The court held that Canadian General created a relationship with Minnesota by contracting to insure Domtar against liabilities in Minnesota, and that relationship provided Minnesota courts with personal jurisdiction over Canadian General in suits arising out of or relating to that relationship.

In a split decision, the court of appeals affirmed, holding Canadian General subject to personal jurisdiction in Minnesota because Domtar's cause of action against Canadian General arose out of Canadian General's agreement to insure Domtar's Minnesota activities. Domtar, Inc., 518 N.W.2d at 63. The court of appeals reasoned that Canadian General's underwriting practice should have alerted it to the possibility that Domtar could be sued in Minnesota for environmental contamination caused by a manufacturing facility that Domtar had operated in the state for 30 years. Id. at 62. Furthermore, the court of appeals reasoned, "Canadian General should have expected coverage disputes to be resolved in the same forum as the underlying action." Id. In its appeal to this court, Canadian General contends that its contacts with Minnesota are constitutionally insufficient to subject it to personal jurisdiction in Minnesota.

I.

To sustain personal jurisdiction over a foreign corporation, this court must find both that personal jurisdiction is authorized by the Minnesota long-arm statute and that the exercise of such jurisdiction does not violate the due process requirement that the nonresident defendant have certain "minimum contacts" with the forum state. Minn. Stat.

§ 543.19 (1994); World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). The quality of these contacts must be such that the assertion of jurisdiction comports with "'traditional notions of fair play and substantial justice.'" International Shoe, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

The Minnesota long-arm statute, Minn. Stat. § 543.19 (1994), permits courts to assert jurisdiction over defendants to the extent that federal constitutional requirements of due process will allow. Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 410 (Minn. 1992). If the personal jurisdiction requirements of the federal constitution are met, the requirements of the long-arm statute will necessarily also be met. Id. at 411. Therefore, we need only consider whether it is consistent with federal constitutional requirements of due process for a Minnesota court to assert personal jurisdiction over Canadian General. Id.

The Due Process clause of the Fourteenth Amendment limits the power of a state court to exert personal jurisdiction over a nonresident defendant. Kulko v. Superior Court of California, 436 U.S. 84, 91 (1978). To satisfy federal due process, a plaintiff must demonstrate that "'the defendant purposefully established 'minimum contacts' in the forum State.'"[3] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474

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[3] Domtar's brief discusses Canadian General's various contacts with the United States in general, as opposed to its contacts with the specific forum state of Minnesota. This discussion is too general to be relevant in determining whether Canadian General has sufficient minimum contacts with Minnesota. The foreign defendant's relevant contacts are with the forum state, not the United States in general. Cf. United Elec. Workers v. 163 Pleasant Street Corp., 960 F.2d 1080, 1085 (1st Cir. 1992) (explaining that when a federal court's subject matter jurisdiction is founded upon a federal question, the Due Process Clause of the Fifth Amendment, rather than the Fourteenth Amendment, establishes the (...continued)

(1985) (quoting International Shoe, 326 U.S. at 316). Once the plaintiff establishes that the defendant has minimum contacts with the forum, the defendant can still defeat jurisdiction if it can show that the exercise of jurisdiction is not reasonable. See Asahi Metal Indus. Co. v. Superior Court of California, 480 U.S. 102, 113 (1987); Burger King, 471 U.S. at 477.

The minimum contacts requirement may be satisfied in two different contexts. These two contexts are referred to as "general" personal jurisdiction and "specific" personal jurisdiction. Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 n.8 (1984); Valspar Corp., 495 N.W. 2d at 411.

II.

General personal jurisdiction exists when a nonresident defendant's contacts with the forum state are so substantial and are of such a nature that the state may assert jurisdiction over the defendant even for causes of action unrelated to the defendant's contacts with the forum state. See Valspar Corp., 495 N.W.2d at 411. Before a court may constitutionally assert general jurisdiction over a nonresident defendant, the

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constitutional limits of the court's power to assert personal jurisdiction over a foreign defendant, and under the Fifth Amendment, that power is geographically expanded, authorizing personal jurisdiction over alien defendants in federal court based on minimum contacts with the United States, rather than on the contacts between the defendant and the State in which the federal court sits). See also, Asahi Metal Indus., 480 U.S. at 113 (stating "We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts, rather than on the contacts between the defendant and the State in which the federal court sits.") (emphasis in original) (citations omitted).

defendant must have "continuous and systematic" contacts with the forum state. Helicopteros Nacionales, 466 U.S. at 415-16; Real Properties, Inc. v. Mission Ins. Co., 427 N.W.2d 665, 669 (Minn. 1988).

Domtar contends that Canadian General is subject to general personal jurisdiction in Minnesota. To support its contention, Domtar primarily relies on Canadian General's involvement in an unrelated construction project in Minnesota and on its involvement in litigation attending that project. We conclude that Canadian General's activities within Minnesota were insufficient to constitute "continuous and systematic" activity. Consequently, Canadian General's involvement in the construction project does not support general personal jurisdiction over Canadian General in a Minnesota court.

III.

Domtar's case necessarily depends on the presence or absence of specific personal jurisdiction. Specific personal jurisdiction exists when the defendant's contacts with the forum state are limited, yet connected with the plaintiffs claim such that the claim arises out of or relates to the defendant's contacts with the forum. See Burger King, 471 U.S. at 472; Helicopteros Nacionales, 466 U.S. at 414. A single contact with the forum can be sufficient if the cause of action arises out of that contact. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

When a claim arises out of a contract that has a "substantial connection" with the forum state, specific jurisdiction exists. Id. at 223. In determining whether a substantial connection exists between the contract and the forum state, the United States Supreme Court has emphasized that the formation of a contract is an intermediate step in the process of negotiation and future performance. Burger King,

471 U.S. at 479. In Burger King Corp. v. Rudzewicz, the Court explained

> [A] "contract" is "ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction." * * * It is these factors -- prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing -- that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.

Id. (quoting Hoopeston Canning Co. v. Cullen, 318 U.S. 313, 317 (1943)).

Domtar urges this court to conclude that Minnesota courts may assert specific personal jurisdiction over Canadian General based on its alleged agreement to insure Domtar for liability arising out of its Minnesota tar manufacturing operations. Several courts have concluded that a court may assert specific personal jurisdiction over a nonresident insurer when (1) the insurer knows of its insured's contact with the forum; (2) the risk insured against transpires in the forum state; and (3) the forum state is not excluded from the geographic coverage of the insurance policy.[4]

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[4] The "territory-of-coverage rule" generally provides that, in exercising specific personal jurisdiction over nonresident insurance companies, courts infer the necessary contact from policy language defining the territory of coverage. William C. Hoffman, "Personal Jurisdiction Over Alien Insurance Companies: The Territory-of-Coverage Rule, " 26 Tort & Ins. L. J. 703 (1991). In short, if the geographic scope of the coverage includes the forum state, then the court, having jurisdiction over the insured, may exercise jurisdiction over the insurer as well. Id. Hoffman's article raises, but fails to answer, the question of (...continued)

For example, in Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., the Ninth Circuit Court of Appeals held that a Montana court had specific personal jurisdiction over a Canadian insurer whose Canadian insured was involved in a Montana car accident. 907 F.2d 911, 913 (9th Cir. 1990). In that case, the dispute resulted from a single-vehicle accident that occurred in Montana, The owner of the car, John Kraemer, and his wife Claudia, resided in Alberta, Canada at the time of the accident. The Kraemers were insured by Portage La Prairie Insurance Company, a Canadian insurer. At the time of the accident, the Kraemers were passengers in their own car, and Lisa Lorango was driving the car with their consent. Lorango, the driver, was insured by Farmers Insurance, a California insurer. Claudia Kraemer was injured in the accident. Although both Farmers and Portage were purportedly obligated to provide liability coverage, only Farmers provided coverage to Claudia Kraemer. Farmers, purportedly an excess insurer, brought an action against Portage, as primary insurer, in Montana federal district court

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whether the territory-of-coverage rule requires that the event generating the claim against the insurer occur in the forum state. See id. at 715. It is difficult to understand how a court could conclude that specific jurisdiction over a nonresident defendant exists when the forum is not the situs of the injury, because in such a case, the plaintiffs claim would not arise from or relate to the defendant's forum contacts. See, e.g., Travelers Indem. Co. v. Calvert Fire Ins. Co., 798 F.2d 826 (5th Cir. 1986) (holding in case where vessel damage occurred in international waters off the Panama Canal, foreign insurance company that provided liability insurance on vessel lacked sufficient minimum contacts with Louisiana forum to be subject to personal jurisdiction in the forum). Nevertheless, in the present case, because the allegedly covered risk transpired in Minnesota, we need not address the issue of whether a mere territory of coverage clause, without more, is constitutionally sufficient to support personal jurisdiction over a nonresident insurer.

seeking declaratory relief and damages for Portage's refusal to reimburse Farmers.

Because Portage's insurance policy coverage extended into Montana, and because an insured event resulted in litigation in Montana, the court concluded that Portage had purposefully availed itself of the privilege of conducting activities in the forum state. Id., at 913. The court reasoned that personal jurisdiction over Portage derived from its contractual obligation to indemnify and defend its insured, a duty that foreseeably required litigation in any forum where the insured risk traveled. Id. at 914.

The court explained that the Supreme Court's decision in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), did not preclude the exercise of personal jurisdiction over an insurer whose only contact with the forum state is the issuance of an insurance policy covering an accident that occurred in the forum state. Farmers Ins. Exch., 907 F.2d at 913. In World-Wide Volkswagen, the plaintiffs, who had purchased an automobile from a New York dealer and distributor, sued the dealer and distributor in Oklahoma after being involved in a collision in Oklahoma. Id. at 288. The Supreme Court held that the mobility of the automobile and the defendants' ability to foresee its movement to other states were not enough to satisfy the requirements of due process. Id. at 297-98. Nothing about the defendants' conduct indicated that it was willing to be called into court in the foreign state. Id. at 298. The defendants' only connection with Oklahoma was the result of the plaintiffs' unilateral act of driving the car there. Id. at 295. Thus, the Oklahoma court could not constitutionally assert personal jurisdiction over the nonresident defendants. Id. at 299.

Unlike the automobile sellers in World-Wide Volkswagen, the court in Farmers Ins. Exch. reasoned, liability insurers contract to defend and indemnify the insured for claims that will foreseeably result in litigation in foreign states. 907 F.2d

at 914. Thus, litigation requiring the presence of the insurer is not only foreseeable, but it is purposefully contracted for by the insurer. Id. Moreover, unlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its "product" -- the indemnification and defense of claims -- will travel. Id. If Portage wished to avoid suit in Montana, it could have excluded that state from the policy territory defined in the policy. Id. Because Portage controlled its own amenability to suit, the court held that Portage purposefully availed itself of the Montana forum when it contracted to indemnify and defend against claims arising there. Id.[5]

The approach of asserting personal jurisdiction over insurance companies exemplified by Farmers Ins. Exch. faithfully observes the Supreme Court's emphasis in contract cases on the future consequences contemplated by the parties when executing the contract. In the general liability insurance

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[5] Accord Payne v. Motorists' Mut. Ins. Cos., 4 F.3d 452 (6th Cir. 1993) (holding, in action brought by motorists injured in accident occurring in Tennessee, suing as third-party beneficiaries of insured's insurance contract, Tennessee court could assert personal jurisdiction over Ohio insurer); Rossman v. State Farm Mut. Auto. Ins. Co., 832 F.2d 282 (4th Cir. 1987) (holding Virginia court could assert personal jurisdiction over Illinois insurance company based on Illinois insured's accident in Virginia); Szalay v. Handcock, 819 S.W.2d 684 (Ark. 1991) (following Farmers Ins. Exch. and Rossman, the court held that an Arkansas court could assert personal jurisdiction over nonresident insurance company based solely on insurance company's obligation to provide coverage for claims arising in Arkansas, a state within the policy's territorial coverage); N.J. Auto. Full Ins. Underwriting Ass'n v. Independent Fire Ins. Co., 600 A.2d 1243 (N.J. Super. Ct. Ch. Div. 1991) (holding contractual commitment by nonresident insurer to defend its insured against claims arising out of accidents occurring in New Jersey constituted sufficient contact with New Jersey to subject insurer to suit in New Jersey when its insured was involved in accident in New Jersey and that accident generated third-party claim).

context, the parties contemplate that the insurer will defend and indemnify the insured. Further, the defense is presumably contemplated to occur where the insured is sued.

In cases following the approach exemplified by Farmers Ins. Exch., the insurer must know of its insured's contact with the forum state before the court will conclude that the insurer purposefully established minimum contacts with the forum state. In 1956, at the earliest, Canadian General issued its first liability policy purportedly covering Domtar's operations in Minnesota. This was 7 to 8 years after Domtar's subsidiary ceased manufacturing operations at the tar plant and two years after Domtar's subsidiary sold its part of the Site. Thus, Canadian General maintains that it did not know of Domtar's Duluth tar manufacturing operations at the time it first insured Domtar.

In evaluating whether Canadian General knew of Domtar's Duluth tar manufacturing operation, we note that an insurer has a commercial interest in knowing how, and to what degree, its insured has contacts with the forum state. See Eli Lilly and Co. v. Home Ins. Co., 794 F.2d 710, 721 (D.C. Cir. 1986) (stating that insurers have a commercial interest in knowing where an insured risk is located so that the insurer can accurately estimate the liability risks and appropriately adjust the policy premium) cert. denied, Falcon Ins. Co. v. Eli Lilly and Co., 479 U.S. 1060 (1987). To fix an appropriate premium, an insurer usually requires information regarding the insured's activities. Id. at 720-21.

Canadian General's contemporary underwriting practice involves ascertaining the extent of a prospective insured's activities in the United States and then deciding whether to accept those risks and what premium to charge. Since 1984, all risks located in the United States have required approval before Canadian General will issue an insurance policy covering the United States risk. Canadian General's Casualty Manager recalls only two instances since 1984 in which

Canadian General knowingly covered an insured's operations in the United States.

Domtar's brief and many exhibits in the record discuss Domtar's business operations throughout the United States during the alleged policy period. Canadian General's conservative approach to insuring United States risks supports the conclusion that Canadian General would have sought to discover the extent of Domtar's operations in the United States before issuing a general liability policy to Domtar. Furthermore, as the court of appeals indicated, the possibility that a manufacturer, such as Domtar, could be liable for groundwater contamination and responsible for cleaning up the pollution has been recognized in Minnesota since the late 1800's. Domtar, Inc., 518 N.W.2d at 62 (citing Minnesota Mining & Mfg. v. Travelers Indem. Co., 457 N.W.2d 175, 183 (Minn. 1990)). Thus, before issuing a general liability policy to Domtar, Canadian General presumably would have sought to discover the extent and nature of Domtar's past operations in the United States and, thereby, would have discovered Domtar's former ownership of the tar manufacturing plant in Duluth.[6]

Canadian General has not retained any of Domtar's applications for insurance coverage, any of the policies issued to Domtar, or any of the underwriting materials presumably gathered or generated at the time it issued the policies to Domtar. Nevertheless, Canadian General's Executive Vice-President speculated that the 1960 underwriting file on Domtar would likely have included a description of Domtar's

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[6] Domtar's business operations in Minnesota are only indirectly relevant to determining whether Canadian General has sufficient minimum contacts in Minnesota. That is, they are relevant only in evaluating whether Canadian General knew it was insuring Domtar's Minnesota tar manufacturing operations and, thereby, purposefully established minimum contacts in Minnesota.

operations, an estimate of Domtar's sales by type of operation, the location of Domtar's operations, a description of Domtar's prior claims history, inspection reports pertaining to Domtar's operations and possibly a breakdown of Domtar's Canadian and U.S. sales.

Based on the information likely contained in Canadian General's 1960 underwriting file, we conclude that Canadian General constructively knew that Domtar had formerly operated a tar manufacturing facility in Duluth. By deciding to issue a general liability policy allegedly insuring Domtar against liability arising from its Duluth tar manufacturing operation, Canadian General purposefully established the required minimum contacts with Minnesota. Furthermore, Minnesota is the situs of the accident creating liability that Canadian General purportedly agreed to defend Domtar against.

For these reasons, we hold that Domtar's coverage claim against Canadian General arises out of or relates to Canadian General's minimum contacts with Minnesota, thereby supporting a Minnesota court's assertion of specific personal jurisdiction over Canadian General in the present case.

IV.

Finally, we must determine whether a Minnesota court's assertion of specific personal jurisdiction over Canadian General would comport with "traditional notions of fair play and substantial justice." International Shoe Co. v. Washington, 326 U.S. at 320. The concept of "fair play and substantial justice" can defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities. Asahi Metal Indus., 480 U.S. at 116; Burger King, 471 U.S. at 477-78. The defendant bears the burden of presenting "a compelling case that the presence of some other

considerations would render jurisdiction unreasonable." Burger King, 471 U.S. at 477.

In deciding whether the exercise of jurisdiction is reasonable, courts consider factors such as the burden on the defendant in litigating in the forum state, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. Burger King, 471 U.S. at 477; World-Wide Volkswagen, 444 U.S. at 292. The unique burdens placed upon a foreign defendant who must defend itself in a foreign legal system should have significant weight in assessing the reasonableness of stretching personal jurisdiction over national borders. Asahi Metal Indus., 480 U.S. at 114.

The record indicates that Canadian General is not unduly unfamiliar with the American legal system. In addition, because the legal system is generally uniform throughout the United States, Canadian General's litigation throughout the United States supports the reasonableness of retaining jurisdiction in Minnesota.

Because Domtar is a Canadian corporation, the present case is not one in which the State of Minnesota's interest derives from the desire to provide a forum for its resident plaintiff. Nevertheless, this case is unlike the typical case involving two non-residents because the alleged environmental contamination occurred in Minnesota. Minnesota's interests in conserving natural resources, decreasing environmental pollution and protecting the environment are "unquestionably * * * state interests of great magnitude." Can Manufacturers Inst., Inc. v. State, 289 N.W.2d 416, 420 (Minn. 1979); see also Minnesota Environmental Rights Act, Minn. Stat. § 116B.01 (1994) (proclaiming "it is in the public interest to * * * protect air, water, land and other natural resources located

within the state from pollution, impairment, or destruction."). Because efforts to clean up contaminated sites are expensive, the state has a further interest in making sure the costs are paid by those responsible for the contamination.

Canadian General is one of three alleged primary liability insurers for the Domtar tar manufacturing site. Without Canadian General's presence in the present litigation, either Domtar or other insurers will be required to seek contribution from Canadian General in Canada, resulting in piecemeal and fragmented litigation. Moreover, the evidence of contamination, the effectiveness of remediation efforts and the expert witnesses, many of whom will presumably be from the MPCA, are all located in Minnesota. Thus, efficient resolution of this case favors retaining jurisdiction in Minnesota.

Considering the relevant factors, we conclude that Canadian General has failed to rebut the presumption of reasonableness, and we hold that subjecting Canadian General to specific personal jurisdiction in Minnesota comports with traditional notions of fair play and substantial justice.

Affirmed.

JJ. Coyne, Gardebring and Stringer took no part in the consideration or decision of this case.

STATE OF MINNESOTA

IN COURT OF APPEALS

CX-93-2449

Ramsey County
District Court File # C0918218

Schumacher, Judge
Dissenting, Lansing, Judge

Domtar, Inc.,

Respondent,

v.

Douglas L. Skor
Kathleen Erickson DiGiorno
Briggs and Morgan
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Paul Anton Zevnik
John Osborne
Zevnik, Horton, Guibord
& McGovern
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Niagara Fire insurance Co., et al.,

Defendants,

Canadian General Insurance Co.,

Appellant.

Larry A. Hanson
Leonard W. Glewwe
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55 East Fifth Street
St. Paul, MN 55101

Filed: June 21, 1994
Office of Appellate Courts

SYLLABUS

A Minnesota court can exercise personal jurisdiction over a Canadian insurer in a declaratory judgment action brought in Minnesota by its insured, a Canadian corporation, when the insured has been sued in Minnesota for property damage in Minnesota alleged to have been caused by the insured's manufacturing operation in Minnesota.

Affirmed.

Considered and decided by Schumacher, Presiding Judge, Lansing Judge, and Randall, Judge.

OPINION

SCHUMACHER, Judge

Canadian General insurance Company appeals from the district court's denial of Canadian General's motion to dismiss for lack of personal jurisdiction. We affirm.

FACTS

Respondent Domtar, Inc. is a Canadian corporation with its principal place of business in Montreal, Quebec. Canadian General is also a Canadian corporation; its principal offices are in Scarborough, Ontario.

in 1924, Dominion Tar & Chemical Company Ltd., a predecessor to Domtar, opened and began operating a tar plant in Duluth, Minnesota. The plant was in operation from 1924 until 1948, when it was shut down permanently. Domtar sold the property on which the plant was located in 1955.

The Domtar plant was located in an industrial area on the north bank of the St. Louis River in West Duluth, approximately four river miles from Lake Superior. The plant

was on a peninsula, with the Stryker Embayment to the west. Pollutants have been found in the river. The Peninsula, an adjoining boat slip and the Stryker Embayment are part of a 230-acre superfund site that was placed on Environmental Protection Agency's national priorities list in 1983 and on the Minnesota Pollution Control Agency's (PCA) permanent list of priorities in 1984.

On March 26, 1991, the PCA issued a request for response action to, among others, Domtar. The request for response action identified Domtar as a potentially responsible party and requested that Domtar conduct investigations and submit reports to the PCA.

Domtar tendered the PCA's claim to its insurers, who refused the tender. Domtar commenced a declaratory judgment action in Ramsey County, Minnesota against its insurers, asserting the insurers were obligated to investigate the PCA's claims, and to defend and indemnify Domtar in the PCA proceedings. Canadian General moved to dismiss, asserting that the Minnesota court lacked personal jurisdiction over Canadian General.

Canadian General is not licensed to do business in Minnesota and has never sold insurance in its own name in this state.[1] Canadian General maintains no offices outside of Canada and is not licensed to do business in any state of the United States. In addition, Canadian General rarely insures U.S. operations and charges a higher premium for coverage of U.S. sales than Canadian sales.

According to Domtar, Canadian General issued primary liability insurance to Domtar from 1956 through 1965. The

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[1] Canadian General has, however, conducted business in Minnesota through another insurer. See County of Hennepin v. Ada-Bec Sys. , 394 N.W. 2d 611 (Minn. App. 1986)., pet. for rev. denied (Minn. Dec. 17, 1986).

only Canadian General policy found so far covered Domtar between January 1, 1960 and January 1, 1963, and was a renewal of a previous policy. The property damage endorsement to the 1960-63 policy provided that Canadian General would

> PAY on behalf of the Insured all sums which the insured shall become obligated to pay * * * for damages because of damage to or destruction of property caused by accident occurring within the Policy Period and while this Endorsement is in force.

At the time the policy was issued, the customary practice was to issue policies for three-year terms. Although Canadian General did not retain the underwriting file from 1960, it surmised that the file should have contained information on Domtar's operations, including estimated sales broken down by various types of operations, prior claims history and inspection reports of Domtar's main operations and main locations.

When Canadian General moved for dismissal, the district court ordered further discovery on the jurisdiction issue. Following discovery, the district court determined that it could exercise personal jurisdiction over Canadian General. Canadian General appeals.

ISSUE

Did the district court err in concluding it could exercise personal jurisdiction over the Canadian insurer of a Canadian corporation for property damage in Minnesota which occurred during the policy period and was allegedly caused by the insured's activities in Minnesota?

ANALYSIS

Standard of Review

An order denying a motion to dismiss for lack of personal jurisdiction is appealable as a matter of right. Stanek v. A.P.I., Inc., 474 N.W.2d 829, 831 (Minn. App. 1991), pet. for rev. denied (Minn. Oct. 31, 1991), and cert. denied, ___ U.S. ___ (1992). Whether personal jurisdiction exists presents a question of law that this court reviews de novo on appeal. Id. at 832.

1. The Long Arm Statutes

Whether personal jurisdiction over a nonresident exists depends on two criteria: (1) whether the requirements of Minn. Stat. § 543.19 (1992), the long arm statute, have been satisfied; and (2) whether there are sufficient "minimum contacts" to satisfy constitutional due process requirements. Stanek, 474 N.W.2d at 832 . Whether the requirements of the long arm statute have been met presents a question of state law; whether there are sufficient minimum contacts to satisfy due process is a question of federal law. Id.

The legislature intended the long arm statute to have the maximum extraterritorial effect allowed under the United States Constitution. Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 410 (Minn. 1992). Because the legislature intends the long arm statute to be coextensive with the limits of due process, the only issue presented in this appeal is whether the exercise of personal jurisdiction over Domtar is consistent with the requirements of the federal Constitution. Id. at 411. Any doubt regarding the sufficiency of contacts to allow the exercise of personal jurisdiction should be resolved in favor of jurisdiction. Id. at 412.

2. Due Process

The minimum-contacts test for long arm jurisdiction was first recognized in International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S. Ct. 154 (1945). See Note, Minimum Contacts in Contract Cases: A Forward Looking Reevaluation, 58 Notre Dame L. Rev. 635 n.1 (1983). Under International Shoe, a nonresident defendant may be subject to the personal jurisdiction of a state's courts if the defendant has sufficient minimum contacts with the foreign state so that the exercise of jurisdiction over the nonresident does not offend "'traditional notions of fair play and substantial justice.'" International Shoe, 326 U.S. at 316, 66 S. Ct. at 158 (quoting Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 343 (1940)); see also Rush v. Savchuk, 444 U.S. 320, 100 S. Ct. 571 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559 (1980); Kulko v. Superior Court, 436 U.S. 84, 98 S. Ct. 1690 (1978); Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569 (1977). In making this determination, the focus is on "the relationship among the defendant, the forum, and the litigation." Shaffer, 433 U.S. at 204.

The decision in International Shoe recognized that modern travel and communication technologies have greatly reduced the burden on a defendant imposed by litigating outside of its home state. McGee v. International Life Ins., 355 U.S. 220, 222-23, 78 S. Ct. 199, 201 (1957). With respect to insurance, the Court weighs heavily the consequences of the insurer's contractual obligations in the state where the insurer's obligations are to be carried out. Travelers Health Ass'n v. Commonwealth of Virginia, 339 U.S. 643, 648, 70 S. Ct. 927, 930 (1950).

Personal jurisdiction over a foreign corporation is consistent with due process requirements when the corporation has "purposefully avail[ed] itself of the privilege

of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240 (1958) (citing International Shoe, 326 U.S. at 319, 66 S. Ct. at 154). If a corporation has purposefully availed itself of the benefits and protections of the forum state's laws, the corporation has "clear notice that it is subject to suit" in the forum state. World-Wide Volkswagen, 444 U.S. at 297, 100 S. Ct. at 567. It can then protect itself from the burden of litigation by procuring insurance. Id.

The purposeful availment must consist of actions taken by the defendant that "create a 'substantial connection' with the forum State." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 2184 (1985) (quoting McGee, 355 U.S. at 223, 78 S. Ct. at 201). A customer's unilateral act of bringing the corporation's product into the forum state is insufficient to create personal jurisdiction. World-Wide Volkswagen, 444 U.S. at 295-96, 100 S. Ct. at 566.

Courts must exercise greater caution in exercising personal jurisdiction across international boundaries than across interstate boundaries. Asahi Metal Indus. v. Superior Court, Solano County, 480 U.S. 102, 114, 107 S. Ct. 1026, 1033 (1987). When a court exercises personal jurisdiction across state lines, two interests are implicated: the right of the defendant not to be burdened by unfair litigation in a distant forum and the proper role of one state's courts in a federal system. World-Wide Volkswagen, 444 U.S. at 291-92, 100 S. Ct. at 564. When national borders are crossed, a court must give "significant weight" to the "unique burdens" of a defendant that is forced to defend itself in a foreign legal system. Asahi, 480 U.S. at 114, 107 S. Ct. at 1033. In addition, a state's exercise of personal jurisdiction in the international level may involve considerations of the United States, foreign relations policies. Id. at 115, 107 S. Ct. at 1034. Canadian General has not indicated any unique burdens

imposed on it by having to enter a foreign legal system, nor has Canadian General shown any potential foreign policy concerns that might be affected by Minnesota's exercise of personal jurisdiction.[2]

In this case, Domtar was doing business in Minnesota. It obtained insurance to cover its potential liability created by its Minnesota operations, as the Court recognized corporations could do in World-Wide Volkswagen, 444 U.S. at 297, 100 S. Ct. at 567. Canadian General issued an insurance policy that afforded Domtar protection against liability for property damage caused by Domtar's operations, including its Minnesota operations. Canadian General's underwriting process should have alerted Canadian General to the possibility that its insured could be sued in a state where the insured had operated a manufacturing facility for 30 years.

In this case, Domtar had ceased operation in Minnesota at least two years before the first Canadian General policy was issued. Nevertheless, the possibility that a manufacturer could be liable for groundwater contamination and responsible for cleaning up the pollution has been recognized in Minnesota since the late 1800's. Minnesota Mining & Mfg. v. Travelers Indemn. Co., 457 N.W.2d 175, 183 (Minn. 1990). Domtar had operated in Minnesota for over 30 years. It obtained insurance to cover its potential liability created by its Minnesota operations, as the court recognized corporations

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[2] Clearly, both Canada and the United States have an interest in assuring the clean-up of pollution that could affect both countries. The Domtar site is on a river four miles from Lake Superior, the largest lake in North America, a lake on which the states of Minnesota, Wisconsin and Michigan, and the providence of Ontario, border. The broad issue Domtar's declaratory judgement action raises is how the clean-up is to be financed. Canadian General has not shown that the present declaratory judgment action contravenes a clearly established policy of the Canadian government fixing responsibility for payment of clean-up costs.

could do in World-Wide Volkswagen, 444 U.S. at 297, 100 S. Ct. at 567. According to one of Canadian General's officers, the underwriter file should have contained information on Domtar's operations and locations. Thus, Canadian General should have been aware that it was insuring Domtar for potential liability for groundwater contamination in Minnesota at the time it entered into the insurance policies. See Minnesota Mining & Mfg., 457 N.W.2d at 183 (at time entered into insurance policies, parties aware of potential liability for groundwater contamination).

Moreover, the property damage has been ongoing. Damage to property occurring during Canadian General's policy period would trigger the Canadian General coverage. Industrial Steel Container Co. v. Fireman's Fund Ins. Co., 399 N.W.2d 156, 159 (Minn. App. 1987), pet. for rev. denied (Minn. Mar. 18, 1987).

Canadian General should have expected coverage disputes to be resolved in the same forum as the underlying action. A claim has been brought against Domtar alleging Domtar's operations in Minnesota have caused property damage in Minnesota. Responding to Domtar's declaratory judgment action in Minnesota is a responsibility that attends issuance of the policy. See St. Paul Surplus Lines Ins. Co. v. Cannelton Indus., 823 F. Supp. 498, 502-03 (W.D. Mich. 1993). This case does not involve a unilateral act by Domtar in bringing Canadian General's product into Minnesota; Canadian General and Domtar entered into a contract of insurance for Domtar's liability. The present case is an action on that contract brought in the place of performance.

The declaratory judgment action brought by Domtar against Canadian General arises out of the issuance of an insurance policy, as well as the administrative proceedings that have been commenced against Canadian General's insured in Minnesota. This provides a sufficient basis for exercising personal jurisdiction over Canadian General. See AIU Ins.

Co. v. Superior Court, 222 Cal. Rptr. 880 (Cal. App. 1986), pet. for rev. denied (Cal. May 21, 1986), cert. denied, 479 U.S. 821 (1986). In AIU, a Bermuda-based insurance company was sued in California by Shell Oil Company. The states of California and Colorado, the United States Environmental Protection Agency and the United States Army had sued Shell Oil Company for damages and cleanup costs associated with the Rocky Mountain Arsenal in Colorado and a toxic waste site near Fullerton, California. AIU, 222 Cal. Rptr. at 881. The court held that the cause of action against the insurer arose out of the insurer's forum-related activity of insuring Shell's assets and activities in California. Id. at 885. In the present case, as in AIU, the cause of action against Canadian General arises out of Canadian General's insuring of Domtar's assets and activities in Minnesota. We hold that this is sufficient to allow a Minnesota court to exercise personal jurisdiction over Canadian General. See AIU, 222 Cal. Rptr. at 886.

Domtar argues that Canadian General agreed to be subject to suit anywhere in the United States and Canada because the Canadian General policy defined the coverage territory as the United States and Canada. Domtar urges this court to apply what has come to be known as the territory-of-coverage rule, under which any forum within the geographic territory covered by an insurance policy can exercise jurisdiction over the insurer. See William C. Hoffmann, Personal Jurisdiction Over Alien insurance Companies: The Territory-of-Coverage Rule, 26 Tort & Ins. L. J. 703 (1991).

In this case, there is no need to resort to the territory-of-coverage rule. Although Canadian General issued a policy covering Domtar's liability in the United States and Canada, what is significant is that Canadian General should have been aware of Domtar's previous contacts with Minnesota and agreed to insure Domtar for its potential liability. This is not a case in which Domtar's products have gone from Minnesota to

another state and caused injury or property damage there. The insured's operations in Minnesota have caused damage in Minnesota. This is not the "fortuitous presence" of a Canadian General insured; Domtar's factory was in Minnesota for 30 years. Cf. Sparkowich v. American S.S. Owner's Mut. Protection & indem. Ass'n, 687 F. Supp. 695 (D. Me. 1988).

Canadian General agreed to insure Domtar for liability arising out of its operations, including its operations in Minnesota. Canadian General's conduct and connection with Minnesota are such that it should reasonably anticipate being haled into court here. World-Wide Volkswagen, 444 U.S. at 297, 100 S. Ct. at 567.

DECISION

Canadian General is subject to the jurisdiction of the Minnesota courts in this declaratory judgment action.

Affirmed.

s/s
ROBERT H. SCHUMACHER

6/15/94

LANSING, Judge (dissenting).

I respectfully dissent. The evidence is undisputed that two years before Canadian General first decided to insure Domtar, a Canadian company, Domtar had sold its Minnesota plant and no longer conducted operations in Minnesota. Because Canadian General directed no contacts toward Minnesota, the exercise of jurisdiction violates longstanding jurisdictional principles and disregards the enhanced jurisdictional burden that applies when the defendant is a foreign national.

The United States Supreme Court distinguishes between general and specific jurisdiction. General jurisdiction is measured by the existence or extent of "continuous and systematic" contacts with the forum state. *Helicopteros Nacionales v. Hall*, 466 U.S. 408 416, 104 S. Ct. 1868, 1872 (1984); *see also Valspar Corp. v. Lukken Color Corp.*, 495 N.W.2d 408, 411 (Minn. 1992) (general jurisdiction exists when "a defendant conducts so much business within a state that it becomes subject to the jurisdiction of that state's courts for any purpose"). Specific jurisdiction may be based on only a few contacts with the forum state, but the case must arise out of or relate to one of those specific contacts. *Helicopteros*, 466 U.S. at 416, 104 S. Ct. at 1872; *Valspar*, 495 N.W.2d at 411.

As the majority implicitly recognizes, general jurisdiction is not available over Canadian General. Although Canadian General had some contacts with Minnesota in the 1970s and 1980s, when it provided bonds to another Canadian company for a Minnesota medical center, these contacts are not the type of "continuous and systematic" contacts that would support an exercise of jurisdiction. *See Helicopteros*, 466 U.S. at 416; *see also Valspar*, 495 N.W.2d at 411.

Neither is specific jurisdiction available. This is a declaratory judgment action brought by Domtar against

Canadian General in Minnesota. Domtar has not provided any concrete evidence of Canadian General directing contacts toward Minnesota by insuring Domtar. *See Hardrives, Inc. v. City of LaCrosse*, 307 Minn. 290, 293, 240 N.W.2d 814, 816 (1976) (when a defendant challenges jurisdiction, the plaintiff has the burden of proving a *prima facie* case supporting jurisdiction). Although a defendant need not be present within a state to be subject to jurisdiction, the defendant must have "purposely directed" efforts toward residents of the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184 (1985).

According to the parties, Domtar's Duluth plant was sold in 1955. Domtar alleges in its complaint that Canadian General first insured it in October 1956. The evidence varies slightly from the allegation and shows that Canadian General likely first insured Domtar in 1957. Domtar submitted evidence demonstrating that its contacts with the Duluth site extended to April 1956. Whichever evidence is accurate, there is *no* evidence that Domtar had any connection with Minnesota at the time Canadian General first insured it.

Canadian General submits evidence stating that it never insured Domtar's Minnesota operations and this evidence is consistent with the information Domtar provides. Although Canadian General may have considered Domtar's past presence in Minnesota when deciding whether to insure Domtar, no underwriting records exist to show that such consideration took place. Even if these records did exist, however, it is unlikely that Canadian General would have foreseen that it would be haled into a Minnesota court based on its act in insuring a Canadian company, which at the time the insurance policy was first issued, did not own property in Minnesota or have any contacts with Minnesota. *Cf. McGee v. International Life Ins.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201 (1957) (finding jurisdiction over insurance company when contract was delivered in forum state, premiums were mailed

from forum state, and insured was a resident of forum state at time of death).

Domtar, in this action, is seeking coverage from sixteen insurers. Although pragmatic considerations favor allowing Domtar to resolve all coverage questions in one action, these pragmatic concerns cannot override longstanding jurisdictional principles, particularly when the principles are applied to a foreign national. *See Asahi Metal Indus. v. Superior Court of Cal.*, 480 U.S. 102, 115, 107 S. Ct. 1026, 1034 (1987) (courts must exercise great care and reserve when extending notions of personal jurisdiction into the international field). Canadian General has not purposefully availed itself of the "privilege of conducting activities within the forum state, thus invoking the benefits and protection of its law. *See Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240 (1958).

Minnesota has a strong interest in holding parties responsible for environmental harm. But Minnesota clearly has jurisdiction over Domtar, the party that is liable for response costs. Domtar's suit against Canadian General is basically for indemnification, and although Minnesota has an interest in Canadian General's indemnification of Domtar, this interest cannot create jurisdiction. *See Asahi*, 480 U.S. at 114-15, 107 S. Ct. at 1033 (recognizing that California had only minimal interests in an indemnification suit between two foreign nationals). Domtar is free to proceed against Canadian General in Canadian courts.

A defendant must have minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). Canadian General's contacts with

Minnesota are insufficient to establish either general or specific jurisdiction, and I would reverse.

s/s
Harriet Lansing
June 15, 1994

FILED
NOV 17 1993
J.E. GOCKOWSKI
COURT ADMINISTRATOR

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

File No. CO-91-8218

Domtar, Inc.,

Plaintiff,

ORDER

vs.

Niagra Fire Insurance Co., Continental Insurance Company, Allstate Insurance Company of Canada, American Home Assurance Company, Canadian General Insurance Company, Chubb Insurance Company of Canada, Columbia Casualty Company, Federal Insurance Company, Gerling Global Reinsurance Corporation, Halifax Insurance Company, INA Insurance Company of Canada, New Hampshire Insurance Company, Scottish & York Insurance Company, Zurich Insurance Company, World Auxiliary Insurance Corporation Limited, and Certain Underwriters at Lloyd's of London,

Defendants.

The above-entitled matter came on before the undersigned on November 4, 1993 in connection with the Canadian General Insurance Company's motion to dismiss under Rule 12.02(b). Larry Hanson appeared on behalf of Canadian General Insurance Company. Douglas Skor appeared on behalf of Domtar.

Based upon all the arguments of counsel, the files and proceedings herein,

IT IS HEREBY ORDERED,

1. That Canadian General's motion to dismiss for lack of personal jurisdiction is denied in all respects.

2. The following memorandum is hereby incorporated herein.

Dated: November 16, 1993 BY THE COURT

s/s
JOHN S. CONNOLLY
Judge of District Court

MEMORANDUM

FACTS

Domtar is a Canadian Corporation that operated in Minnesota, from 1924-1955. From 1924-1948, Domtar operated a tar plant in West Duluth. Domtar closed the tar plant in 1948, but did not sell the plant until 1955.

Defendant Canadian General issued liability insurance policies to Dominion Tar and Chemical (Domtar) from 1956-1965. The policy expressly insured risks in Canada and the United States. Although only one policy was found from the period 1960-1962, circumstantial evidence indicates Domtar was insured from 1956-1965 by Canadian General.

ISSUE

Does an insurance policy clause providing indemnity for torts committed in Canada and the United States provide sufficient contacts with Minnesota such that an insurer could reasonably expect to be hailed into Minnesota courts.

ARGUMENT

In Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County (Cheng Shin Rubber industrial Co., Ltd.) to determine jurisdiction, a court must consider

> the burden on the defendant, the interest of the forum State, and the plaintiff's interest in obtaining relief . . . the interstate judicial systems interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.

Id. at 113. Utilizing this test in the case at hand, the defendant insurance company's main office is in Toronto Ontario Canada, a province that adjoins Minnesota to Canada, therefore, the burden on the defendant is slight. In addition, it appears at this time the vast majority of witnesses on this subject will be from Minnesota.

Looking at the second test, the interests of the forum state, the interest of Minnesota is far greater than any state or province covered in Canadian General's policy. If there was pollution, it happened in Minnesota and the victims of said pollution were the residents of Minnesota.

With regard to the third part of the test, the plaintiff has an interest in having this matter decided expeditiously. This case has been in this court for two years and is not scheduled

for trial in November 1994. If it is moved to Canada it is unlikely it will be tried by the November date.

In the Asahi case, Justice O'Connor stated,

> When minimum contacts have been established often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant. In the present case, however, the interest of the plaintiff and the forum in California's assertion of jurisdiction over Asahi are slight. All that remains is a claim for indemnification answered by Cheng Shin, a Taiwanese corporation, against Asahi. The transaction on which the indemnification claim is based took place in Taiwan; Asahi's components were shipped from Japan to Taiwan. Cheng Shin has not demonstrated that it is more convenient for it to litigate its indemnification claim against Asahi in California rather than in Taiwan or Japan.
>
> Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished. The Supreme Court of California argued that the State had an interest in "protecting its consumers by ensuring that foreign manufacturers comply with the state's safety standards." 39 Cal.3d, at 49, 702 P.2d, at 550. The State Supreme Court's definition of California's interest, however, was overly broad. The dispute between Cheng Shin and Asahi is primarily about indemnification rather than safety standards. Moreover, it is not at all clear at this point that California law should govern the question whether a Japanese corporation should indemnify a Taiwanese corporation on the basis of a sale made in Taiwan and a shipment of goods from Japan to Taiwan.

Id. at 114-15.

Here we have an entirely different situation. Although Domtar is also a foreign corporation, if Domtar committed any acts of pollution, it occurred in Minnesota while it was doing business in Minnesota. In the Asahi case, all that was left of the law suit was an indemnification claim that was based on what took place in Taiwan, some 5000 miles away from where Asahi's components were shipped. In this case, the pollution takes place in Minnesota. Defendant Canadian General accepted insurance premiums and in consideration insured Domtar against losses sustained by Domtar in any province of Canada or any state of the United States, including Minnesota.

The fourth test is weighing the interstate judicial system's interest in obtaining the most efficient resolution of the controversy and the shared interest of the several states in furthering fundamental substantive social policies. Minnesota is the proper jurisdiction to decide this case because Minnesota is in a much better position to make a determination of whether Domtar polluted its land and water and if so, Domtar's indemnity carriers obligation with regard to the same.

PURPOSEFUL AVAILMENT

For this court to have jurisdiction over Canadian General under the doctrine of purposeful availment, it would mean the defendant must have objective grounds for an expectation that the defendant might be sued in the foreign state. This is not, however, simply a question of the defendant being able to foresee a law suit here. The Supreme Court stated in World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286, 297 (1980), the foreseeability of litigation "is not wholly irrelevant, but the foreseeability that is critical to due process analysis . . . is that the defendant's contact and connection with the forum

state are such that he should reasonably anticipate being hailed into court there." Canadian General must have reasonably anticipated being hailed into the State of Minnesota where the alleged pollution took place.

Jurisdiction is proper where the contacts proximately result by the action by the defendant himself. Asahi at 112. The substantial connection "between the defendant and the forum state necessary for a finding of minimum contacts must come about by an action of the defendant purposely directed towards the forum state. Burger King v. Rudzewicz, 471 U.S. 462, 476 (1984); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984). Here defendant Canadian General purposely directed actions towards the forum State of Minnesota by issuing an indemnity policy covering claims against Domtar in any state of the United States, including Minnesota.

The Minnesota Court of Appeals discussed Asahi in Stanek v. A.P.I., Inc., 474 N.W.2d 829, 859 (Minn. Ct. App. 1991). The Court held Minnesota had jurisdiction over a case filed against a foreign asbestos mining corporation by workers injured by exposure to asbestos. Jurisdiction was proper because the foreign asbestos mining corporation has sufficient Minnesota contacts with Minnesota. In Stanek, Judge Parker stated,

> We are confronted with the cases of Minnesota workers who allege they have been afflicted with terrible diseases as a result of exposure to asbestos. Minnesota has a strong interest in providing a forum for their cases. Indeed, it is inscribed in our constitution: Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, comformable to the laws.

Id. at 835. This case is similar to the Stanek case. The MPCA alleges that Domtar polluted the soil and possibly the waters of Minnesota.

Canadian General is not inconvenienced to by having to resolve the case in Minnesota. Minnesota is a state that borders the province of Canadian General's principle place of business. This is not a situation where one party is located 5000 miles from the other, giving Minnesota a distant interest in providing a forum for the action. In Payne v. Mutual Fire and Auto. Ins. Co., 381 N.W.2d 523 (Minn. Ct. App. 1986), the Court of Appeals held that in Iowa automobile insurer that insured an Iowa resident, under a restricted coverage of a 75 mile radius from the insured's place of business in Laurens, Iowa. The Minnesota Court of Appeals held that Minnesota had jurisdiction even though the accident was near the Twin Cities, more than 75 miles form Laurens, Iowa, but less than 75 miles from the Minnesota border.

In differentiating World-Wide Volkswagen, Judge Forsberg stated,

> Unlike the dealer and distributor in World-Wide Volkswagen, whose contact with Oklahoma arose through the fortuitous travels of their customer, Mutual Fire purposefully insured whatever travels Reed might undertake in one area of Minnesota through territorial limitation extending into this state. Thus we need not decide whether the act of insuring the traveling tortfeasor is sufficient contact to afford personal jurisdiction. Since Mutual Fire's policy included a territorial limitation excluding all foreign jurisdictions except Minnesota, it need not be vulnerable to suit in all fifty states in order to be subject to the jurisdiction of Minnesota courts.

Id. at 525. In this case, Canadian General's contact with Minnesota is much more specific. Rather than having a territorial limitation to certain parts of Minnesota, Canadian General indemnifies any occurrence in any province of Canada or any state of the United States, including Minnesota.

THE TERRITORY-OF-COVERAGE RULE

In an article entitled, "Personal Jurisdiction Over Alien Insurance Companies: The Territory-of-Coverage Rule, 26 *Tort & Ins. L.J.* 3 (1991), William C. Hoffman concludes that numerous courts exercise jurisdiction over alien insurance carriers on a basis that appears to require less contact than the Constitution generally requires. In Travelers Health Assoc. v. Virginia, the United States Supreme Court departed from prior law and upheld the exercise of jurisdiction over a foreign insurer. The court held that the Virginia law conferring jurisdiction over the defendant did not offend due process. 339 U.S. 643 (1950). "[W]here business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state," the necessary contacts exist. Id. at 649. The Court reasoned that to deny jurisdiction would unjustly compel the insureds to "seek redress only in some distant state where the insurer is incorporated." 339 U.S. at 649.

In describing the territory of coverage rule, Hoffman stated, "the majority of U.S. courts that have addressed the issue to date holds that the inclusion of the forum state in the territory of coverage of an insurance policy may support jurisdiction over an insurer." Hoffman, *supra*, at 709. Hoffman concluded,

> insurers who designate "U.S.A." in a territory-of-coverage clause thereby may establish "minimum contacts" with that territory. Now the issues is

> whether this rule may be applied consistently with the Constitution in the international field against an alien insurer who has no other contact with the forum state. It seems that an alien insurer providing coverage for a risk "in the U.S.A." is not unfairly subjected to the jurisdiction of the courts of a state where that risk was realized.

Id. at 719.

In a close case, doubts should be resolved in favor of retention of jurisdiction. Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 411-12 (1992).

CONCLUSION

Canadian General created the relationship with the Minnesota by contracting to insure plaintiff against liabilities in Minnesota. This act gives Minnesota courts personal jurisdiction in a lawsuit arising out of or relating to Canadian General's forum contacts. See Valspar at 411; "Specific and General Jurisdiction–The Reshuffling of Minimum Contacts Analysis," 59 *Tulane L. Rev.* 832, 833 (1985).

JSC

STATE OF MINNESOTA

IN SUPREME COURT

CX-93-2449

Domtar, Inc.,

Respondent,

vs.

OFFICE OF
APPELLATE COURTS

JUL 25 1995
FILED

Niagara Fire Insurance Co., et al.,

Defendants,

and

Canadian General Insurance Co., petitioner,

Appellant.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that Canadian General Insurance Company's petition for rehearing, be, and the same is, denied.

Dated: July 25, 1995

BY THE COURT:

s/s A.M. Keith
Chief Justice

Coyne, Gardebring, and Stringer, JJ. took no part or consideration in the decision of this case.

(2)

No. 95-656

Supreme Court, U.S.
FILED
NOV 22 1995
CLERK

In the

Supreme Court of the United States

October Term, 1995

Canadian General Insurance Company,

Petitioner,

vs.

Domtar Inc., Niagara Fire Insurance Company, Continental Insurance Company, World Auxiliary Insurance Corporation Limited and Certain Underwriters at Lloyd's of London,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF OF RESPONDENT DOMTAR INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, may exercise personal jurisdiction over a Canadian commercial liability insurer that had agreed to defend and indemnify a Canadian insured in the forum state against claims arising in the forum state out of manufacturing operations conducted in the forum state.

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STATEMENT OF THE CASE

I. The Underlying Claims and Action against the Insurers.

From 1924 to 1954, Domtar Inc. ("Domtar") owned and operated a plant for processing coal tars in Duluth, Minnesota. Appendix to Brief of Respondent Domtar Inc. to Minnesota Supreme Court ("R.A.") at 5 (Case No. CX-93-2449, filed February 7, 1994). The plant was located on the banks of the St. Louis River, which flows into Lake Superior, R.A. at 3, and adjoined a large pig iron manufacturing plant that provided Domtar with coal tar as a by-product of coking operations. R.A. at 19. Domtar distilled the coal tar into various products for resale, including roofing tar and road tar. R.A. at 5. The Minnesota Pollution Control Agency ("MPCA") has designated the entire area, including ground and surface waters, as a priority site.

In December 1991, the MPCA informed Domtar that it was potentially responsible for soil and water damage at and around the tar plant site and commenced proceedings against Domtar in Minnesota under state environmental statutes. Those proceedings, which continue today, have required Domtar to incur and pay substantial investigative and defense costs and will ultimately require Domtar to undertake remediation activities at the site. In 1992, Domtar sought coverage from its liability insurers, including Canadian General Insurance Company ("Canadian General"), for the claims asserted by the MPCA. When its insurers failed to provide coverage, Domtar initiated a breach of contract and declaratory judgment action in Ramsey County (Minnesota) District Court seeking contract damages and a declaration that its liability insurers were obligated to defend and indemnify Domtar against the claims asserted by the MPCA.

Of the 15 insurers included in the suit, six are Canadian, two British, and the remainder American insurers. Only Canadian General, based in Ontario and now owned by the New York investment firm of Kohlberg, Kravis, Roberts & Co.,[1] moved for dismissal based on lack of personal jurisdiction. While Canadian General was appealing an adverse ruling on jurisdiction, the case against the remaining insurers continued. Domtar voluntarily dismissed without prejudice its claims against 10 carriers, but successfully tried its claims against the four remaining carriers to a jury.

II. The Canadian General Insurance Policies and Underwriting Procedures.

Canadian General issued primary liability insurance to Domtar from at least 1956 or 1957 to 1965. The parties have uncovered only one actual policy to date, the 1960-62 policy ("the Policy"). Appendix to Brief of Appellant Canadian General to the Minnesota Supreme Court ("AA.") at 550-63 (Case No. CX-93-2449, filed January 6, 1994). The Policy states that it is a renewal of a previous policy. AA. at 550. Canadian General officers acknowledge that the terms and conditions of its coverage of Domtar from 1957 through 1960 would have been the same as set forth in this Policy. AA. at 411, 503-06. Domtar alleges that coverage by Canadian General began by at least 1956 and extended to 1965. AA. at 8.

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[1] Canadian General was purchased by Kohlberg, Kravis, Roberts & Co. during the pendency of its appeal to the Minnesota Supreme Court. Brief of Respondent to Minnesota Supreme Court at 37 n. 11. The State of Minnesota invests a substantial amount of its state employee pension funds in Kohlberg, Kravis, Roberts & Co. and its enterprises. *See Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1032 (2d Cir. 1992).

Canadian General issues comprehensive general liability insurance using the standard CGL form developed by the Insurance Bureau of Canada. AA. at 408, 439. The form currently in use, as well as the form issued to Domtar, expressly covers risks in both Canada and the United States, but excludes risks in other countries. AA. at 417, 439. If and when Canadian General wishes to limit its exposure in the United States, it must either decline to issue the policy or add an endorsement that limits or excludes risks in the United States. AA. at 418, 440. Competition and other practical factors prevent Canadian General from using a policy form or routinely adding a provision that excludes United States coverage. According to the Executive Vice President at Canadian General, routine exclusion of United States risks would mean that "we wouldn't write any business." AA. at 422.

The underwriting staff at Canadian General determines the extent of an insured's activities and sales in Canada and United States and then decides whether to accept those risks and what premium to charge for them. AA. at 419-21, 440. Canadian General keeps no records that show the number of past or present policyholders with operations or sales in the United States. AA. at 440, 476. A small sampling of the underwriting file for current policyholders reveals several which have sales in the United States, including some which paid higher premiums for the United States risks than the Canadian risks. AA. at 455-65, 469-76, 691-700.

With the passage of time, records are sparse and the persons actually involved in the Domtar underwriting are no longer available. Nonetheless, consistent with its past and current underwriting practices, the Executive Vice President for Canadian General testified that the underwriting file on Domtar would likely have included a detailed analysis of Domtar and its operations, estimated sales by types of

operations, locations of its operations, prior claims history, inspection reports pertaining to the main operations and a breakdown of Canadian and United States sales. AA. at 412-13. Based on the information about Domtar that would likely have been in underwriting files of Canadian General, combined with its commercial interest in knowing how, and in what degree, its insured has contacts with the forum state, the Minnesota Supreme Court concluded that "Canadian General constructively knew that Domtar had formerly operated a tar manufacturing facility in Minnesota." Petition for Certiorari ("Pet.") at A-15.

III. Contacts of Domtar with the Forum State from 1956 through 1965.

Contrary to the impression left by the factual recitation of Canadian General, Domtar had numerous contacts throughout the United States and in Minnesota during the years when Canadian General issued policies to Domtar. The record identifies numerous Domtar and government agency records that document the operations and sales of Domtar in the United States during this time.

After the partial demolition of the Duluth tar plant in 1954, Domtar continued to pay one of the former tar plant employees to be a watchman at the site and made payments into the Minnesota unemployment compensation fund into 1956. AA. at 83. From 1956 until at least 1958, Domtar was paying claims for roof repairs (possibly arising out of its sale of the roofing materials manufactured by the Duluth plant) in Detroit Lakes and Pine City, Minnesota, Fargo, North Dakota, and Dubuque, Iowa. AA. at 85. Between 1956 and 1965, Domtar entities owned or leased plants, offices, depots, land and timber in Michigan, California, New York, Washington, Maine and Pennsylvania. AA. at 83, 90-91. Sales in the

United States between 1961 and 1965 approached or exceeded $60,000,000 per year. AA. at 87. Newsprint sales into the United States exceeded 58,000 tons in 1960, AA. at 86, including many shipments to Duluth and St. Paul in 1964. AA. at 86, 110-14. Other activities and holdings included a joint venture with a Swedish company to manufacture and sell a lightweight concrete product in the United States, AA. at 83-84; the sale of salt into the United States, AA. at 84; construction of a lime plant in Tacoma, Washington, AA. at 85; the addition of facilities for metal powders in California and Pennsylvania, AA. at 86; and payments to vendors and government agencies in Minnesota, including the Minnesota Secretary of State, American Hoist and Derrick, Minnesota Mining and Manufacturing Co., and the University of Minnesota. AA. at 86-87. The Minnesota Supreme Court acknowledged the substantial record evidence of these activities and sales in reaching its conclusion that, due to the nature of the Canadian General underwriting process, Canadian General had knowledge of the tar plant operations in Minnesota out of which the MPCA claims against Domtar arose. Pet. at A-14.

During the period 1956 to 1965, Canadian General was aware that Domtar had operations in the United States; specifically agreed to cover claims arising out of operations and sales of Domtar in "Canada and the United States of America"; and placed no restriction in its insurance contracts regarding coverage for claims or operations in the United States, including Minnesota. Since 1965, Domtar has continued to conduct operations in the United States as well as Canada. The Canadian General policies have not been commuted and continue to be responsive, as a matter of state contract law, to claims of bodily injury and property damage that allege such injury or damage during any of the Canadian General policy years. *See Northern States Power Co. v.*

Fidelity & Cas. Co. of New York, 523 N.W.2d 657, 659, 663 (Minn. 1994); *SCSC Corp. v. Allied Mut. Ins. Co.*, 515 N.W.2d 588, 595-96 (Minn. Ct. App. 1994), *aff'd in relevant part*, 536 N.W.2d 305 (Minn. 1995); *Fairview Hospital & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.*, 518 N.W.2d 41, 44 (Minn. Ct. App. 1994), *aff'd*, 535 N.W.2d 337 (Minn. 1995).

IV. Prior Experience of Canadian General Litigating in the Forum State.

Nor is it true, as Canadian General would have this Court believe, that insuring risks in Minnesota and participating in litigation in Minnesota courts on matters related to such risks is unprecedented for Canadian General. For a 16-year period beginning in 1973, Canadian General was actively involved in issuing bonds for and completing work on the Hennepin County Medical Center in Minneapolis and in related litigation with Hennepin County.

From 1973 through 1975, Canadian General issued several payment and performance bonds to Ada-Bec, a Canadian company that marketed document distribution systems in the United States. Since Canadian General was not licensed in the United States, it used an American company, Insurance Company of North America ("INA"), as a "fronting company." Canadian General would underwrite the risk, charge and keep the premium, have the bond issued in the name of INA (with the surety manager for Canadian General signing the bond as attorney-in-fact for INA), pay INA a "fronting fee" equal to 10% of the premium, and reinsure INA for 100% of the risk. AA. at 520-22. (The exhibits at AA. 567, 577 and 579 reflect this process for the Ada-Bec bonds on the Hennepin County project.) By utilizing the license of INA for the payment of a small fee, Canadian General

effectively engaged in the surety business in Minnesota and other states without a license. Leaving aside the propriety of this arrangement, it is undisputed that Canadian General has actively engaged in insuring Minnesota risks, taking Minnesota premium dollars and litigating over its obligations in Minnesota.

In 1976, before completion of the Hennepin County project, Ada-Bec became insolvent and was unable to proceed with its commitments. AA. at 523, 527. Canadian General had to step in and complete all of the bonded projects of Ada-Bec in the United States, including work on the medical center in Minneapolis. Completion of the work took six years and cost Canadian General more than $3,000,000. AA. at 529. Canadian General funded the project to completion through an entity known as the McGuire Trust. The McGuire Trust established Minnesota bank accounts and payrolls which were funded exclusively with funds advanced by Canadian General. AA. at 524-25, 527, 537-38. Canadian General also issued a comprehensive general liability insurance policy to cover the ongoing contract completion activities that it was funding. From at least 1978 through 1980, it issued comprehensive general liability policies to W.B. McGuire Engineering with an endorsement naming Ada-Bec as an additional insured for eight listed projects in Minnesota, New York, California and Massachusetts. AA. at 531-36, 609-12.

During the course of the project completion, Hennepin County sued Canadian General, Ada-Bec, and INA in Minnesota state court. All of the defendants in the Minnesota litigation were represented by counsel retained and paid by Canadian General. In its answer to the Hennepin County complaint, Canadian General did not challenge personal jurisdiction, but instead asserted numerous counterclaims. AA. at 632-51. Litigation and related arbitration in Minnesota continued until 1989. AA. at 580-604. In the course of the

litigation, Canadian General took an appeal and obtained a favorable ruling from the Minnesota Court of Appeals. *County of Hennepin v. Ada-Bec Systems*, 394 N.W.2d 611 (Minn. Ct. App. 1986), *pet. for rev. denied* (Minn. Dec. 17, 1986). In short, Canadian General not only insured risks and conducted business in Minnesota, but also sought the protection of the Minnesota judicial system when such a course of action served its interests.

V. The Decisions of the Courts below.

On November 16, 1993, the Honorable John S. Connolly, Ramsey County District Court Judge, denied the motion of Canadian General to dismiss for lack of personal jurisdiction. Judge Connolly concluded that "Canadian General purposely directed actions toward the forum State of Minnesota by issuing an indemnity policy covering claims against Domtar in any state of the United States, including Minnesota." Pet. at C-6. In particular, Judge Connolly noted that, unlike *Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), in which this Court concluded that California lacked personal jurisdiction when an indemnification claim was based on events that took place in Taiwan, the property damage at issue in this case arose out of the activities of Domtar while it was doing business in Minnesota. Pet. at C-5. Judge Connolly also noted that because the property damage is in Minnesota and the people affected are Minnesota residents, "the interest of Minnesota is far greater than any state or province covered in Canadian General's policy." Pet. at C-3.

The Minnesota Court of Appeals affirmed Judge Connolly's order on June 15, 1994. Pet. at B-2. Reasoning from the evidence in the record that "Canadian General's underwriting process should have alerted Canadian General to

the possibility that its insured could be sued in a state where the insured had operated a manufacturing facility for 30 years," Pet. at B-8, the court concluded that operations of Domtar giving rise to its liability for groundwater damage and its responsibility for remedying that damage — a form of liability recognized in Minnesota since the late 1800's — was not a "fortuitous presence" and Canadian General should reasonably have anticipated being haled into a Minnesota court. Pet. at B-11.

The Minnesota Supreme Court affirmed the Minnesota Court of Appeals on June 16, 1995. The supreme court expressly disavowed reliance on the territory-of-coverage clause in the insurance policy. Pet. at A-10 n. 4 ("because the allegedly covered risk transpired in Minnesota, we need not address the issue of whether a mere territory of coverage clause, without more, is constitutionally sufficient to support personal jurisdiction over a nonresident insurer"). The court focused instead on the purposeful act of the insurer in promising to defend and indemnify the insured in the forum state, with the knowledge that the insured had conducted operations in that state which subjected the insured to ongoing potential liabilities in the forum state. Pet. at A-9. The Minnesota Supreme Court instead adopted an approach under which "the insurer must know of its insured's contact with the forum state before the court will conclude that the insurer purposefully established minimum contacts with the forum state." Pet. at A-13.

The Minnesota Supreme Court conducted a thorough review of a comprehensive record and concluded that Canadian General had constructive if not actual knowledge of the ongoing risks associated with the former Domtar tar plant in Duluth. The court noted that an insurer has a commercial interest in knowing the extent of its insured's contacts with a forum in which the insurer promises to defend and indemnify

the insured, Pet. at A-13, and that "litigation requiring the presence of an insurer is not only foreseeable, but is purposefully contracted for by the insurer." Pet. at A-12. The court cited the conservative approach of Canadian General to insuring operations in the United States and the uncontradicted testimony of the Executive Vice President of Canadian General concerning the likely contents of its underwriting file when the relevant policies were issued. Pet. at A-14 - A-15. Recognizing that Minnesota law has supported the imposition of liability on manufacturers for groundwater contamination since the late 1800's, the court also concluded that Canadian General had constructive knowledge of the operations of Domtar in Duluth and, therefore, of the Minnesota risks which it had insured. Pet. at A-14. This is consistent with the fact that Domtar at that time also had numerous operations in other states and substantial sales in Minnesota and other states — risks which Canadian General insured and about which it would have learned during the underwriting process preceding issuance of the policies.

Canadian General petitioned the Minnesota Supreme Court for rehearing. By an order filed July 25, 1994, the court denied the petition. Canadian General filed its petition for certiorari on October 23, 1995.

REASONS FOR DENYING THE WRIT

I. The Minnesota Supreme Court properly applied the precedents of this Court to the unique facts of this case in concluding that specific jurisdiction exists over Canadian General.

Canadian General has been called upon to perform its promise to defend and indemnify Domtar in Minnesota against claims asserted in Minnesota and arising out of the operations

of Domtar in Minnesota. Before entering into the contracts that contain this promise, Canadian General took measures — the underwriting process that is central to the business of insurance — to find out whatever it deemed necessary about the risks in Canada and in the United States that it was about to insure. Canadian General accepted the risks and the premiums, but now seeks to flee the forum in which its promise is to be performed. The Minnesota Supreme Court properly concluded that Minnesota has personal jurisdiction over Canadian General to determine whether coverage exists under the policies issued to Domtar and whether Canadian General breached its contracts by refusing to defend or indemnify Domtar against the claims of the State of Minnesota.

Canadian General mischaracterizes the decision of the Minnesota Supreme Court in order to create the illusion of a conflict with precedents of this Court. It is indisputable, however, that the court below was aware of the relevant decisions of this Court. Beginning with *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Minnesota Supreme Court cited and carefully analyzed the applicable case law, including *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987). Pet. at A-6 - A-7, A-8 - A-9, A-15 - A-16. The due process test developed in these cases and applied by the Minnesota Supreme Court seeks to determine whether sufficient defendant-initiated contacts exist to establish the defendant's purposeful availment of the benefits of the forum. After careful analysis, the court below concluded that the action against Canadian General arose out of the purposeful contacts of Canadian General with Minnesota. Pet. at A-15; *see* Pet. at A-8 (*citing Burger King*, 471 U.S. at 472, and *Helicopteros*

Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984)). Its analysis is entirely consistent with the standard developed by this Court for establishing personal jurisdiction.

The basis of the determination by the state supreme court was the deliberate decision of Canadian General to insure the risks associated with the former operations of Domtar in Minnesota. The record showed, consistent with established industry practice, that Canadian General typically goes to considerable lengths to determine the nature and location of the risks it will insure. Based on these underwriting practices and the admission of Canadian General that the same process would have been used in underwriting the policies issued to Domtar, the court below found that before issuing its policies to Domtar, Canadian General would have known about and therefore knowingly insured the risks associated with the former Minnesota operations of Domtar. Consequently, Canadian General knew or was properly deemed to have known that Domtar operated the tar plant in Duluth for 30 years and that Domtar would remain potentially liable for property damage caused by its activities at the site. Pet. at A-14 - A-15.

These jurisdictional facts are fully supported by the record before the Minnesota Supreme Court. Those facts and the explicit reasoning of that court vitiate the argument of Canadian General that the court below held that the mere issuance of an insurance policy with coverage throughout the United States created minimum contacts with the forum. Rather, the court below held that Canadian General consciously underwrote the risks arising out of the Minnesota operations and promised to perform services in Minnesota, *i.e.*, to defend and indemnify Domtar, should those risks result in any claims against Domtar in Minnesota.

Although the court below extensively cited and relied upon *Burger King* and *Asahi Metal*, Canadian General argues

that the rationale of these two cases supports its assertion that the Minnesota Supreme Court departed from the precedent of this Court. That argument is incorrect. In *Burger King*, the Court noted that, while an individual's contract with an out-of-state resident cannot alone establish sufficient minimum contacts, "prior negotiations and contemplated future consequences" can establish constitutionally sufficient minimum contacts. 471 U.S. at 479. In this case, the underwriting process and the conscious decision to insure the risks in Minnesota were part of the prior negotiations leading to the contract. The promise of Canadian General to defend and indemnify specifically contemplated performance of that promise in Minnesota should claims be asserted against Domtar there. *See* John A. Appleman, *Insurance Law and Practice*, § 4682 (Berdal ed. 1979 and Supp. 1994).

In *Asahi Metal*, this Court again noted the importance of an act of the defendant "purposefully directed toward the forum state." 480 U.S. at 112 (*quoting Burger King*, 471 U.S. at 475). The Court found a contractual promise of a Japanese supplier of tire valves to indemnify a Taiwanese tire manufacturer insufficient to permit a state court to assert jurisdiction over the Japanese valve maker on a cross claim brought by the Taiwanese tire manufacturer, which had been sued for making an allegedly defective tire. What distinguishes *Asahi Metal* from this case is the nature of the contract and its subject matter. The contract here is an agreement by Canadian General to perform services in Minnesota – to defend and indemnify Domtar in Minnesota against claims made against Domtar in Minnesota and arising out of its Minnesota operations. What Domtar seeks now is for Canadian General to provide what it promised – defense and indemnity in the forum where such claims are now asserted.

The Minnesota Supreme Court expressly disavowed reliance on the "territory of coverage" theory of jurisdiction espoused in some cases. Pet. at A-10 n.4. The decision of Canadian General to insure risks in Minnesota made reliance on that theory of jurisdiction unnecessary. Indeed, the court below noted:

> It is difficult to understand how a court could conclude that specific jurisdiction over a nonresident defendant exists when the forum is not the situs of the injury, because in such a case, the plaintiff's claim would not arise from or relate to the defendant's forum contacts.

Pet. at A-10 n.4. In light of this observation, the argument of Canadian General regarding the territory of coverage cases is beside the point.

Finally, Canadian General argues that the court below erred in ruling that the assertion of personal jurisdiction would not offend traditional notions of fair play and substantial justice. Consistent with the precedent of this Court, however, the Minnesota Supreme Court began by observing that even if minimum contacts exist, it still may be unreasonable to assert jurisdiction. Pet. at A-15 (*citing Asahi Metal*, 480 U.S. at 116). The court quite reasonably concluded that Canadian General was neither "unduly unfamiliar" with the legal system of this country nor a stranger to the Minnesota courts. Pet. at A-16 -A-17; *see Ada-Bec*, 394 N.W.2d at 612, and text at pp. 6-8, *supra*. Canadian General, based in the largest metropolitan area in Canada and owned by a large United States firm, can point to no meaningful burden caused by the resolution of its contractual obligations in the courts of Minnesota. Further, Minnesota has an important interest in

the environmental proceedings that are the subject of the coverage dispute. The underlying claims are asserted in Minnesota by a Minnesota agency on behalf of Minnesota, its citizens and its natural resources. Witnesses with knowledge of the underlying claims and the necessary remediation efforts, factors that will drive overall costs and the concomitant financial exposure to Canadian General, are in Minnesota. Pet. at A-17. Canadian General points to no fact and cites no decision of this Court which would indicate that the Minnesota Supreme Court acted unreasonably in relying on these facts to find that the assertion of Minnesota jurisdiction comports with traditional notions of fair play and justice.[2]

II. The central issue is a narrow factual dispute that presents no opportunity for this Court to resolve an important and recurring issue of federal law.

This case does not present the Court with an opportunity to address an important, unsettled question of federal law. Rather, it merely poses the question whether the record supports the factual conclusions drawn by the courts below. The decision of the Minnesota Supreme Court is a straightforward application of the precedents of this Court and

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[2] *Cf. Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 131, 649 A.2d 379, 391 (1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1175 (1995) (merits of analytically similar *forum non conviens* claim raised by Canadian General described as "flimsy at best"). The interest of Minnesota in applying its own law also supports the retention of jurisdiction over parties and claims affecting Minnesota resources. This Court has held that due process is not violated by the application of the law of the forum state – as was the case here when the courts below applied Minnesota law to this contract dispute. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1965).

Minnesota law to specific facts. The certiorari jurisdiction of this Court simply is not used to resolve such limited factual questions. Given that the Minnesota Supreme Court carefully reviewed the record and applied to the facts the relevant precedent of this Court, the observations of then Justice Rehnquist are germane:

> The only remaining issue presented by applicant is whether the quality and nature of its contacts with the State of California are such that "maintenance of the suit [in the forum state] does not offend `traditional notions of fair play and substantial justice . . .'" Such questions generally tend to depend on the particular facts of each case, . . . and I believe that only a marked departure by a lower court in the application of established law would persuade four Justices to grant certiorari. While the Superior Court's decision does not purport to resolve all of the factual disputes between the parties, there is no indication that it failed to apply the due process standards enunciated in *International Shoe*, and cases which have followed it, to the circumstances presented, and, therefore, I believe it is unlikely that this issue would command the votes necessary for certiorari.

General Council on Finance and Administration of the United Methodist Church v. Superior Court of California, 439 U.S. 1369, 1373-74 (1978) (citations omitted) (brackets in original). This case similarly lacks any issue worthy of certiorari.

The Minnesota Supreme Court expressly eschewed reliance on any special or expansive rule for insurance contracts or on a territory of coverage rationale for asserting jurisdiction. Indeed, it indicated that it would not, given the precedent of this Court, merely rely on the territory of coverage provision in the policy to sustain jurisdiction. Pet. at A-10 n.4. This Court should reject the attempt by Canadian General to manufacture a question worthy of certiorari out of an issue that the Minnesota Supreme Court expressly disavowed.

III. The cases cited by Canadian General are not in conflict with the decision of the Minnesota Supreme Court.

Canadian General asserts that the decision below conflicts with decisions of various state and federal courts. One alleged conflict is with a decision of the New Jersey Supreme Court in which that court held that no jurisdiction existed over Canadian General in an insurance coverage dispute in New Jersey. *See Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 649 A.2d 379 (1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1175 (1995). The second asserted conflict is with several automobile insurance cases involving territory of coverage clauses where courts divided over the significance of those clauses in establishing jurisdiction.

Waste Management is easily distinguished. A waste hauler and its subsidiaries sued more than 150 insurers to determine insurance coverage issues for more than 97 landfill sites, most of them outside New Jersey. In contrast to the situation here, Canadian General in that case had expressly limited its coverage of the Canadian subsidiary of the United States-based parent to *claims arising out of the operations of that subsidiary in Canada*. In the underwriting process,

moreover, Canadian General had determined that the Canadian named insured had no operations outside Canada. 138 N.J. at 127-28, 649 A.2d at 389.

Under the rationale the Minnesota Supreme Court employed, it would have decided the New Jersey case the same way the New Jersey court decided it. The Minnesota court looked at the underwriting process and the knowing decision of Canadian General to insure risks arising out of the former operations of Domtar in Minnesota. In contrast, in *Waste Management*, Canadian General had expressly excluded coverage for United States risks, and its actual insured conducted no activities in New Jersey. In light of these disparate facts, there is no "conflict" between the Minnesota and New Jersey decisions. As in *Waste Management*, certiorari should be denied.

Canadian General also alludes to the territory of coverage rule in an attempt to manufacture a conflict with decisions of other state and federal courts which have rejected the rule in its most rudimentary form. Again, the Minnesota Supreme Court expressly eschewed reliance on the territory of coverage rule, stating:

> [I]n the present case, because the allegedly covered risk transpired in Minnesota, we need not address the issue of whether a mere territory of coverage clause, without more, is constitutionally sufficient to support jurisdiction over a nonresident insurer.

Pet. A-10 n.4. Contrary to the innuendo of Canadian General, the Minnesota Supreme Court meant what it said. It relied on *Farmers Ins. Exchange v. Portage LaPrairie Mutual Ins. Co.*, 907 F.2d 911 (9th Cir. 1990), not for the proposition that

purposeful availment may be found "entirely from the presence of a territory of coverage clause," Pet. at 21, but as a decision exemplifying an approach to jurisdictional analysis under which "the insurer must know of its insured's contact with the forum state before the court will conclude that the insurer purposely established minimum contacts with the forum state." Pet. at A-13. Indeed, in *Farmers Ins. Exchange*, the evidence indicated that agents of the carrier knew the insured's vehicle would travel to the forum state. 907 F.2d at 915. This approach, as the court below noted, is entirely consistent with the precedents of this Court. *See Eli Lilly and Co. v. Home Ins. Co.*, 794 F.2d 710, 721 (D.C. Cir. 1986) (jurisdiction affirmed, in part, because "an insurer has a commercial interest in knowing how, and to what degree, an insured manufacturer has contacts with a forum state.") *cert. denied sub. nom Falcon Inc. Co. v. Eli Lilly and Co.*, 479 U.S. 1060 (1987). Two cases Canadian General cites, *Payne v. Motorists' Mut. Ins. Co's.*, 4 F.3d 452 (6th Cir. 1993), and *Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282 (4th Cir. 1987), both involved the territory of coverage rationale, on which the court below did not rely. Moreover, both cases involved an accident that took place within the forum. Thus, *Payne* and *Rossman* are not in conflict with the result reached below.

In the two cases that purportedly conflict with the decision of the Minnesota Supreme Court, the essential knowledge of the insurer concerning the insured's contacts with the forum state is missing. In *Batton v. Tennessee Farmers Mut. Ins. Co.*, 736 P.2d 2, 7 (Ariz. 1987), the court expressly relied upon the fact that "nothing in the record permits [the inference] that [the insurer] conducted its business knowing that it was regularly coming into contact with [the forum state]." Similarly, in *Meyer v. Auto Club Ins. Ass'n*, 492 So.2d 1314, 1315 (Fla. 1986), both the insured and the insurer were residents of Michigan and the insurer had no

reason to know that the insured would operate its vehicle in Florida. The court stated:

> That [insured], while a Michigan resident, was involved in an automobile accident in Florida, or that he eventually moved to Florida, are mere unilateral acts of the [insured] and cannot, in and of themselves, provide [the insurer] with the requisite minimum contacts mandated by the fourteenth amendment.

Id. In neither of these cases was there any evidence of a conscious decision by the insurer to underwrite the risk in the forum. The policies merely included a standard form provision that provided insurance to automobile drivers anywhere in the United States. Both cases also involved automobiles, which temporarily can be anywhere within the territory of coverage. Unlike those transient risks, the commercial liability risks insured here arise out of manufacturing operations in the forum state and a conscious underwriting decision to insure those risks. Thus, there is no conflict between the decision below and the rationale for the decision in *Batton* and *Meyer*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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